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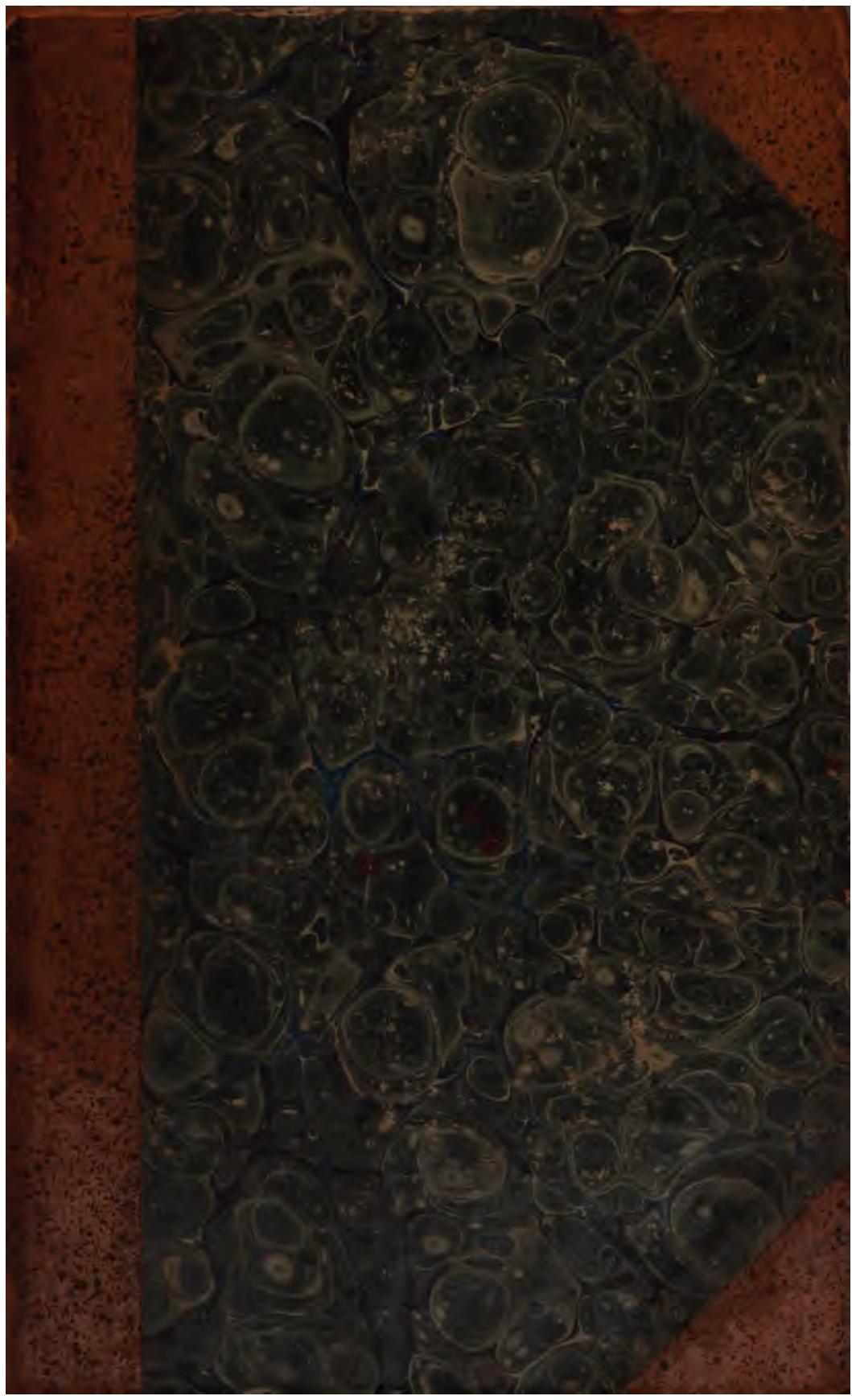
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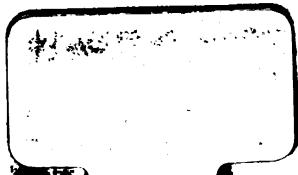


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PRACTICAL TREATISE

ON THE

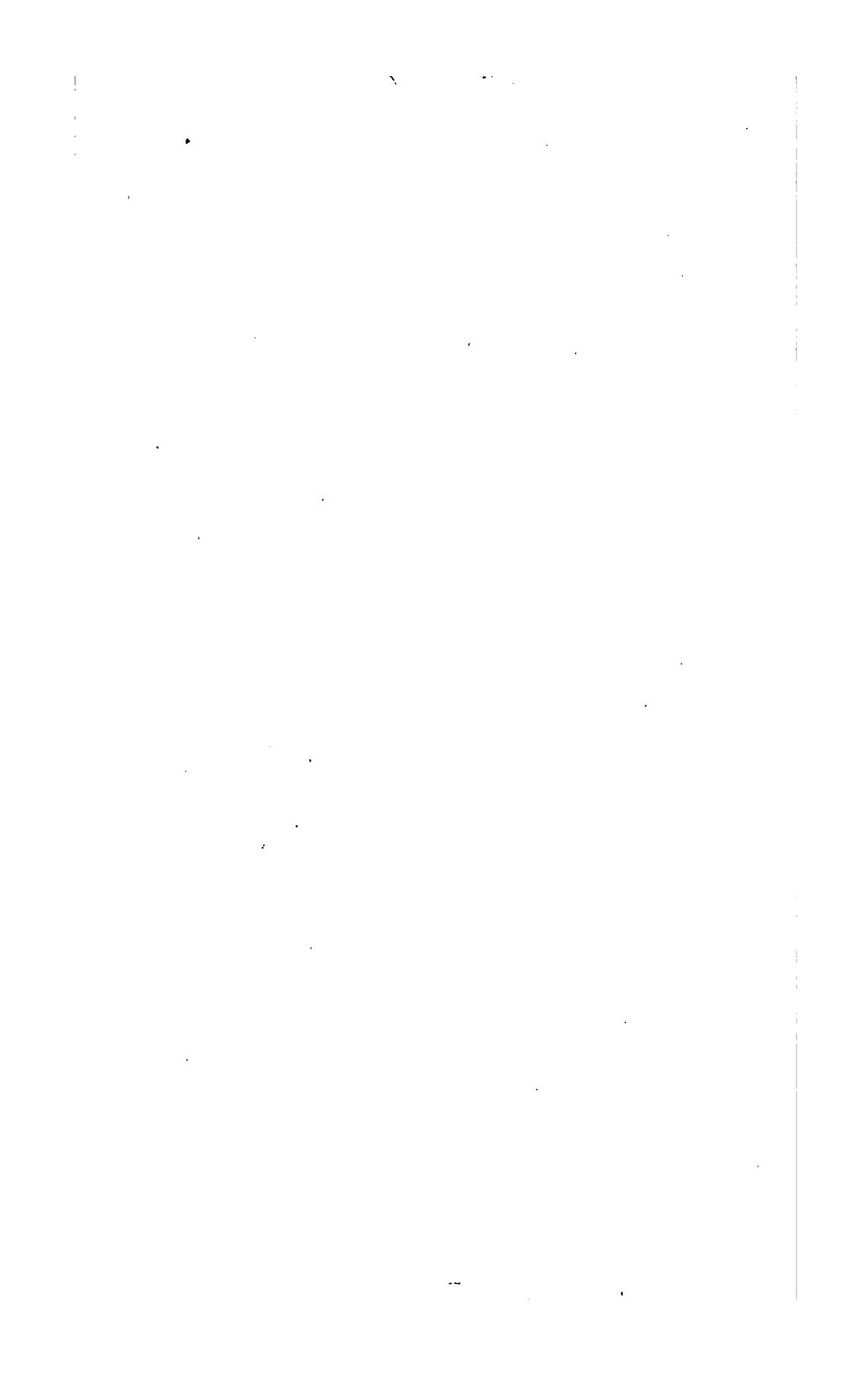
LAW AND DOCTRINE

OF

ELECTION AND SATISFACTION,

APPLICABLE TO

Real and Personal Property.



A 1827

PRACTICAL TREATISE

ON THE
LAW AND DOCTRINE
OF
ELECTION AND SATISFACTION,

APPLICABLE TO
Real and Personal Property;

WITH
AN APPENDIX,
ILLUSTRATIVE OF
THE ANALOGOUS DOCTRINE IN THE LAW OF SCOTLAND.



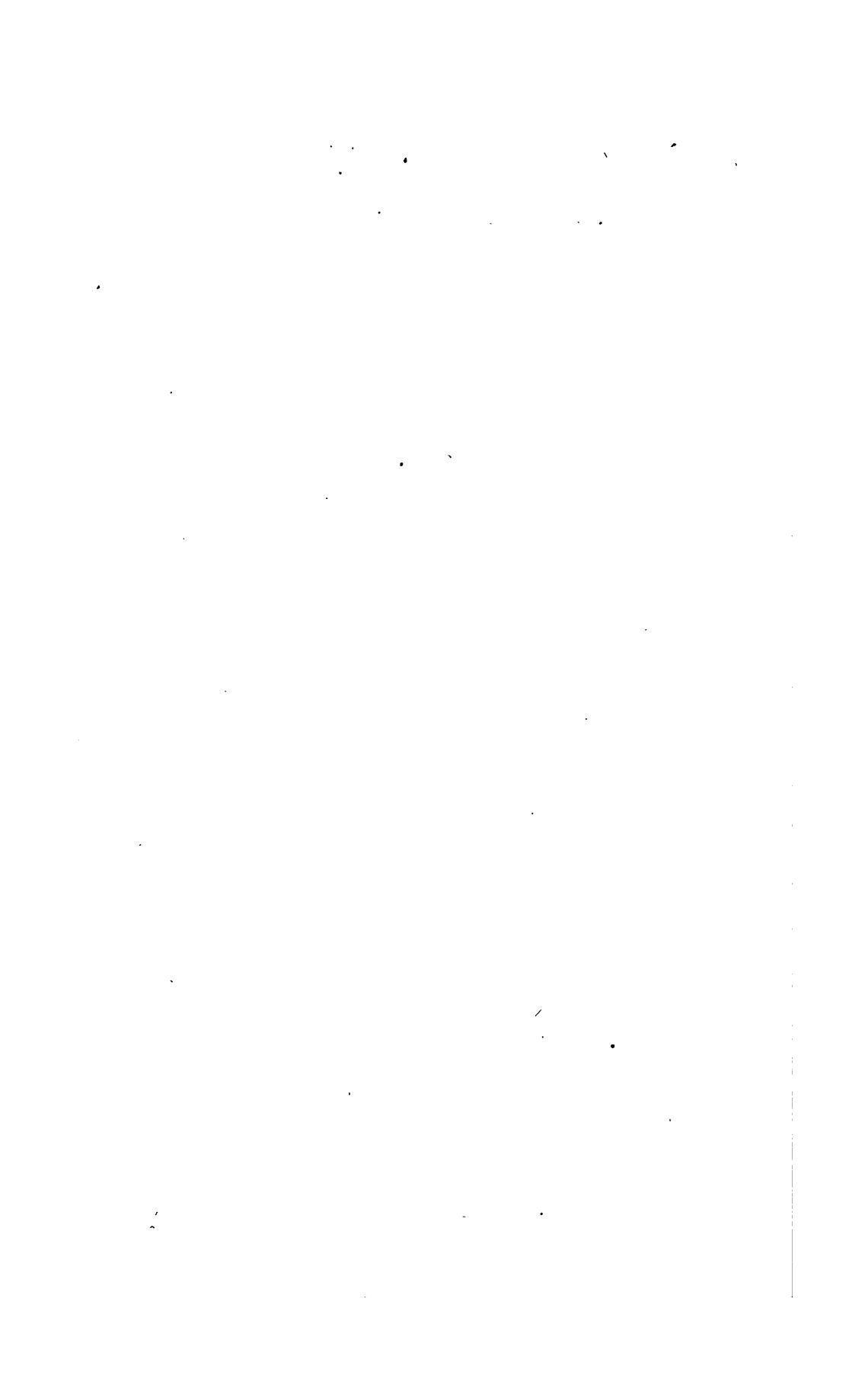
By HENRY STALMAN, Esq.
OF THE INNER TEMPLE.

Si minus erit diserta, elegans, polita haec tractatio, ea est etiam ipsa
materia, quae non tam ornari, quam doceri solummodo desideret.

SCHULTINGII Oratio de Jurisp. Histor.

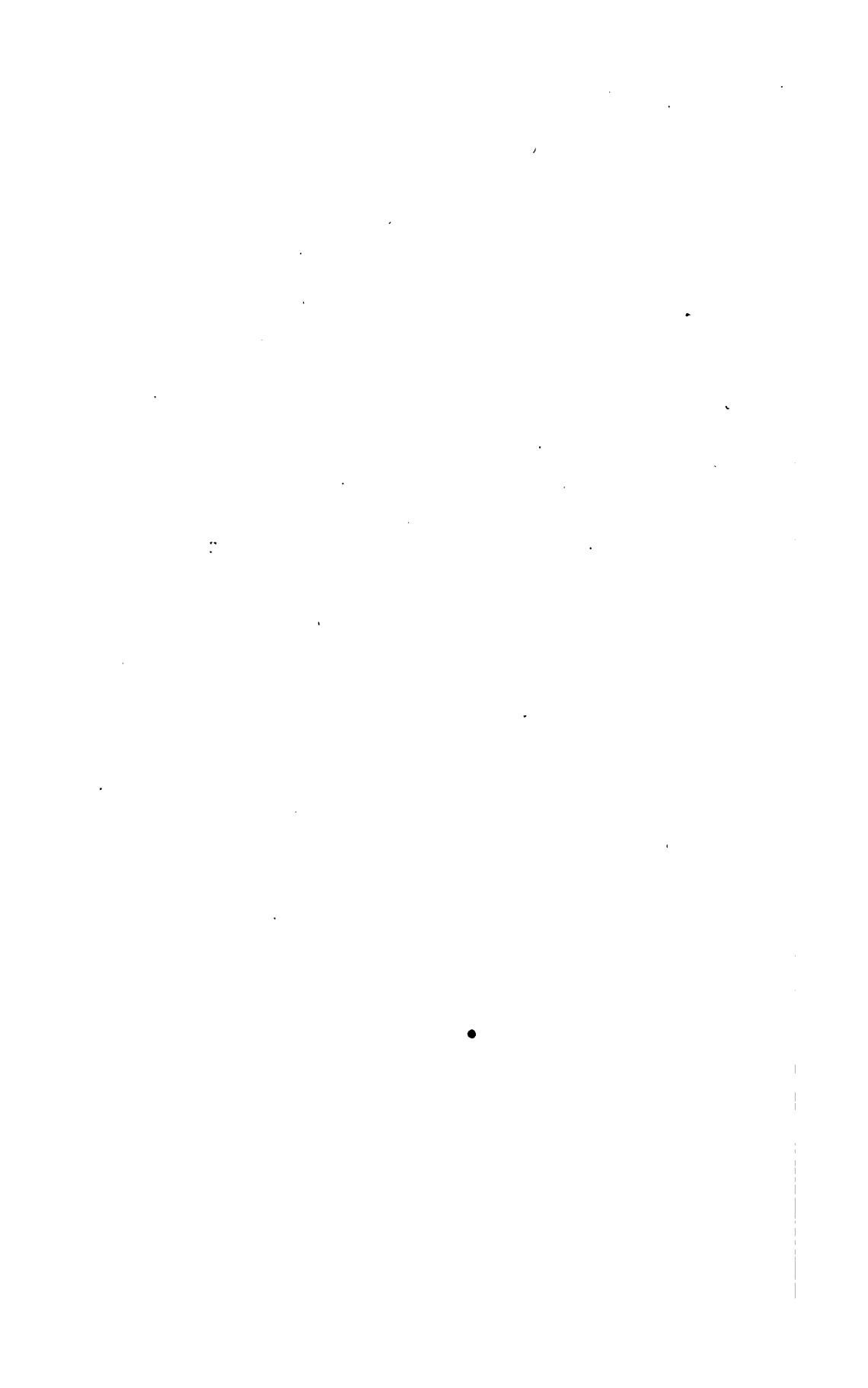
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1827.



TO
THE RIGHT HONORABLE
SIR JOHN SINGLETON COPLEY, KNT.
MASTER OF THE ROLLS,
&c. &c. &c.

THIS TREATISE
IS,
WITH HIS HONOR'S PERMISSION,
MOST RESPECTFULLY DEDICATED.



PREFACE.

THE following treatise was undertaken with a design of bringing into one general view the several cases and authorities relative to election at law, and the doctrine of election and satisfaction in Courts of Equity, to the consideration of which distinct parts have been assigned. The compiler professes to have done little else than reduced into a systematic form the several matters brought under discussion, the novelty of which attempt will, he confidently anticipates, furnish a sufficient apology for the want of any more improved arrangement that may be discoverable. The object throughout has been, not to assert any proposition, without producing an authority in support of it, in order that the reader may exercise his own judgment as to the correctness of what he finds stated.

With respect to the first part it needs only be premised, that some few divisions of it unavoidably consist of inquiries upon points of no very frequent occurrence ; but as they appeared necessary to elucidate the general principle, it is hoped they will prove not altogether unacceptable to the reader.

As to the second part, the following observations present themselves.

Although it will be conceded that the principles upon which the doctrine of election is founded were originally derived from the Civil Law, yet there does not appear to exist in that law any precise recognition of those circumstances, which have so frequently constituted cases of election in our Courts of Equity, namely, a disposition by A. to C. of property belonging to B., and to B. of property belonging to A., (whether A. be ignorant or not that he was disposing of another's property,) and the *implied* condition arising thereupon. A very near approach indeed is made to the doctrine by the Civil Law, where a testator bequeathed to another property belonging to his heir, under the *erroneous supposition* of its belonging to himself; in which case it was incumbent on the heir to make good the bequest, if he took any benefit under the will^a: but since our doctrine would not derive any practical elucidation from the introduction of parallel principles to be met with in the civil law, a reference to them alone may suffice.^b

The importance of the doctrine of election will be readily admitted by the different branches of the profession; and it well merits consideration, whether it may not be occasionally brought into action with a great degree of propriety, in effecting

^a D. xxxi. 67. § 8.

xxx. 59. § 7. C. vi. 37. § 10.; and

^b See Inst. lib. ii. tit. xx. § 4. de
egatis. Ibid. tit. xxiv. § 1. D. see 1 Swanst. 396. *in notis.*

the intention of testators, since the circumstance of its being optional, on the part of a person put to election, either to comply or not with the dispositions assumed to be made by the person promoting the election, appears amply sufficient to shield the doctrine from abuse. The advantage with which it may be brought to bear is particularly obvious in the case of dower; for it might frequently happen, that an assignment of dower according to common right would so dismember the estate of which it constituted a part, as considerably to deteriorate its value, and induce those other inconveniences which are constantly guarded against by jointure provisions.

The chapter on Satisfaction is given, as involving a subject which forms an important branch of the doctrine of election. This subject is treated of but in a limited manner, and is susceptible of greater amplification. The seventh chapter, though unconnected with any preceding one, has been introduced as one that might be expected to be found in a treatise of the present nature.

The Appendix consists of a note, wherein an attempt is made to resolve the corresponding doctrine of *approbate* and *reprobate* in the law of Scotland, by reason of the close analogy it bears to our doctrine of election. This note is put forward with the greater confidence, inasmuch as it has received a perusal from the present very learned professor of Scots law in the University of Edin-

PREFACE.

burgh, and author of the highly esteemed Commentaries on the Law of Scotland, (in the forthcoming edition of which some perspicuous observations are made upon the doctrine in question,) to whom the compiler takes this opportunity of expressing his thanks for the very polite attention his communications received.

INNER TEMPLE,
Hilary Term, 1827.

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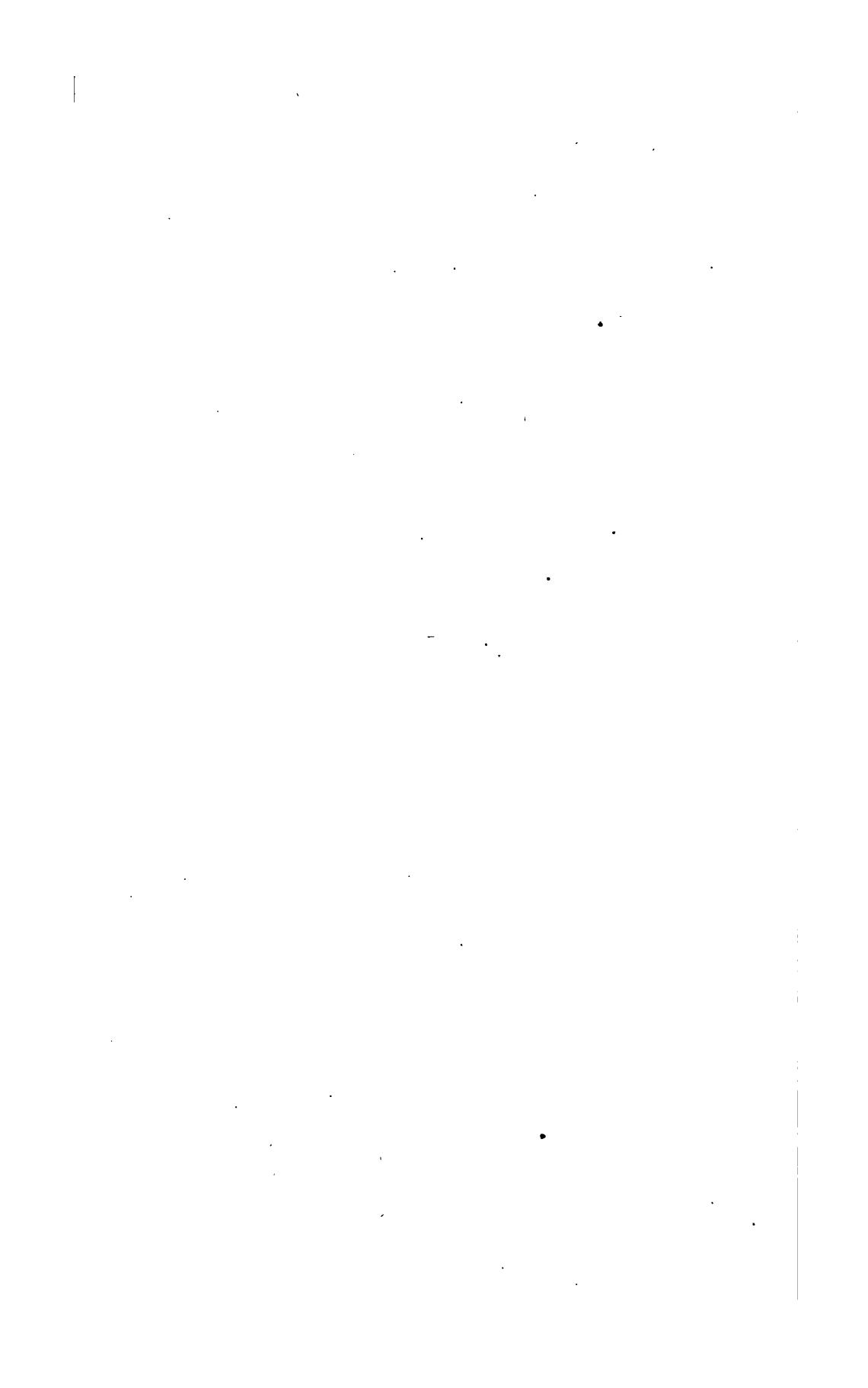
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PART I.

ON ELECTION AT LAW.

THE present Part of the ensuing treatise consists of four chapters, in the first of which are discussed the principles of the law of election applicable to deeds, wills, and instruments of record; in the second chapter election is considered in application to such dispositions of property as are voidable by reason of a disability of person, wherein an inquiry is pursued concerning dispositions of property made by infants, and by persons non compos mentis, and under duress; in the third chapter election is considered in application to such dispositions of property as are voidable by reason of a disability of estate, wherein are brought under inquiry dispositions made by tenants in tail, dispositions affecting the property of feme covert, dispositions made by corporations sole and aggregate, by mortgagors, by disseisors and others having wrongful titles, by guardians in socage and testamentary guardians, by administrators durante minoritate, and by copyholders; and in the fourth and last chapter election is considered in application to the common law as to dower, and the statute law as to jointures; and under the foregoing division of the subject, the law of election will be found to present itself for inquiry in most of its important features.

Introductory re-
marks.

But the term *election*, standing alone, and unexplained either by construction, or by circumstances of time and place, or the occasion on which it is used, being one of

INTRODUCTORY REMARKS.

equivocal meaning, and susceptible of various significations both in courts of law and equity, it may be proper to observe, that with respect to the first chapter, the sense attributable to the term is expressive of a competency, 1. to take one thing under one of several titles, or one of several things under the same title; 2. to reduce to a certainty the operation of deeds, &c.; 3. to take advantage of the breach of conditions; and 4; as to an election of remedies on covenants not performed: with respect to the second chapter, the sense attributable to the term is that of a competency to treat an instrument as conclusive or void by reason of a disability of person in the author of such instrument: with respect to the third chapter, it is that of a competency to treat an instrument as conclusive or void by reason of a disability of estate in the author of such instrument: and in the fourth chapter the sense attributable to the term is expressive, 1. of the ability there is to elect with reference to dower; and 2. between dower and jointure. It may be added, that the peculiar senses in which the term is used in the second Part of the ensuing treatise, will be found fully detailed in their proper place.

CHAPTER I.

ELECTION CONSIDÉRED IN GENERAL APPLICATION TO DEEDS, WILLS, AND INSTRUMENTS OF RECORD.

It is proposed to enter upon the discussion of the subject comprising the first part of the present treatise, by considering the law of election with general reference to deeds operating at common law, and under the statute of uses, to instruments of record, and to wills: and first, to make an inquiry into those cases wherein there is an election to take one and the same thing under one of several titles.

SECTION 1.

Election considered in application to cases where one and the same thing may be taken under one of several titles.

Upon this subject the inquiries to be made are as follows:

I. In what cases there is an election to take one way or another under deeds operating at common law.

II. In what cases there is an election to take one way or another under deeds operating both by statute and common law.

III. In what cases there is an election to take one way or another under deeds operating solely by statute.

As generally applicable to these divisions it may be laid down, that where there is only one subject matter, but an election to take the same under one of several titles, there the subject matter passeth immediately, and the election of the title may be subsequent, and may be exercised, not only by the person to whom it is first given, but also by his heirs or executors.¹

Election
to take the
same thing
under one
of several
titles.

¹ 2 Cb. Rep. 37 a. Co. Lit. 145 a.

CHAR. I.
Sect. 1.
Election to take one thing under one of several titles.

Election not to be prejudicial.

Election under deeds operating by statute and common law.

Cases wherein election may be made.

annuity; and therefore by the grant, the thing presently vested in the grantee, and his election always remained either to make it a thing real to charge the land, or a personal thing to charge the person; and the death of A., by which the rent-charge was determined, was no determination of the annuity.

But this election cannot be exercised to the prejudice of another person; as if a rent de novo be granted to the father in fee, who dies before election; the heir cannot make it an annuity to defeat the dower of the wife.ⁿ

II. In what cases there is an election to take one way or another, under deeds operating both by statute and common law.

When one seised of land in fee, for money demises, grants, bargains, and sells it for years, he by his express grant gives election to the lessee to take it by one way or the other, having power to pass it by a demise or by bargain.^o

And where a father, in consideration of love and 100l. paid by his son, conveyed lands to him, with a letter of attorney in the deed to make livery; the son had election to take by the enrolment or livery, which should be first executed.^p

This case is thus stated and commented upon by Chief Baron Gilbert in his treatise on uses and trusts.^q "If a man, in consideration of money expressed in the deed, sells his land, and gives a letter of attorney to deliver seisin; this passes the use before livery, because the equity to pass the use arises from the payment of the money: and therefore now, since the statute of 27. H. 8., he may choose to have it one way or the other, according as he first wills, either to enrol the deed, or take livery: but if the consideration be not expressed in the deed, it must pass at common law."^r

* See 3 Leon. 154. in Cadee and Oliver's ca.

^o 2 Co. Rep. 55 b. Shep. To. 83. [7th ed.] 1 Pr. Ab. 513.

^p 2 Rol. Ab. 787. pl. 5. cited as Watson and Dicks arg. in Cross-
ing v. Scudamore, 1 Vent. 137.

^q Pa. 95. [5d ed.]

^r It is observable, that a pecuniary consideration is not absolutely essential to the validity of a bargain and sale; but that if money's worth be the consideration, it will do; and the reserva-

It is laid down, that where a man may pass lands either by the common law, or by raising of a use, and intends to pass them in one way, and they will not pass in that particular way, they cannot in many cases pass the other way: and that therefore if a father makes a feoffment to his son, and a letter of attorney to make livery, and no livery is made, no use will arise, as it will in case of covenant.^{*} There can be no doubt however but that such a feoffment might now be substantiated as a covenant to stand seized: and although, according to some of the old cases, the mode or form of conveyance, or the intention as to the mode, was held material, yet in later times, where the principal intention appears to be that the land shall pass, it has been held otherwise.^t It may therefore be now considered as a general rule, though subject to some exceptions, that a deed may be pleaded in any manner in which it will have the effect of fulfilling the intention to pass the lands, without confining its operation to the particular form or mode which the parties contemplated.

CHAR. I.
Sect. 1.
*Election to
take one
thing under
one of
several titles.*

*Heyward's case*ⁿ not only fully exemplifies the species of election under consideration, but also furnishes considerable information on the general law of the subject. In that case, A. being seised in fee of certain manors lands and tenements, whereof part was in demesne, part in lease for years with rent reserved, and part copyhold, for a pecuniary consideration paid to him by three individuals, granted bargained and sold to them the same manors, &c., and the reversions and remainders thereof, with all rents reserved upon any demise; to hold to them and their assigns, after the decease of the said A., for seventeen years, at a nominal rent: and afterwards the said A. by another indenture, covenanted with B. and others to stand seized of

tion of a pepper-corn will be sufficient to raise a use. See Barker v. Keate, 2 Mod. 249. Freem. 249. 2 Wils. 75. Willes, 682. Shove v. Pincke, 5 T.R. 124. 310. Doe v. Whittingham, 4 Taunt. 20.

* Shep. To. 82, 83. [7th ed.] Co. Lit. 49 a. 2 Co. Rep. 35. 2 Inst. 672. 2 And. 202. Poph. 95.; and see

¹ See accord. Roe v. Tranmer, Darrell v. Gunter, W. Jo. 206.

*Chap. I.
Sect. 1.
Election to
take one
thing under
one of
several titles.*

the premises to the use of himself and the heirs of his body. No attornment was ever made to the lessees, and afterwards A. died seised of the premises, his heir within age, and left a third part to descend to his heir: and the questions in the court of wards were, whether the lessees should have the demesnes, and the rents of the copyholders by the demise, as an interest at the common law, and the rents of the lessees for years by bargain and sale by the statute of 27. H. 8. without attornment; or whether any attornment by the common law was requisite to all this future interest; or whether the bargainees should have election to take by the bargain and sale in toto, or by the demise in toto, notwithstanding their general entry; or whether the interest which passed as an interest at common law, should be preferred before the raising of a use: and it was resolved, first, that if it should pass as a future interest at the common law, there ought to have been an attornment of the lessees for years, and the attornment ought to have been in the life-time of A., which was before the interest commenced: secondly, that the interest ought to take effect entirely as a demise at common law, or entirely by bargain and sale by raising of a use, and not for part by common law, and for other part by raising of a use: thirdly, that the lessees had election to take either by demise at the common law, or by bargain and sale; that if the law should force them to take by demise, they would lose the rents reserved upon the said leases for years; for that it was agreed if the interest should take effect by bargain and sale, then an attornment was not necessary, for the statute of 27. H. 8. executed the possession to it: fourthly, that this election remained to the lessees, notwithstanding the alteration of the estate by the second indenture, and the death of the lessor, and notwithstanding also the queen was entitled to the wardship of the heir; for that the lessees had an interest in them presently, which they before election might assign over, and which the executors of the survivor should have, although they all died before election; that there was not election to claim one of two

several things by one and the same title, but to claim one and the same thing by one of two several titles; for that where the things were several, nothing passed before election, and the election of the title ought to be precedent; but that when one and the same thing should pass, there it passed presently, and the election of the title might be subsequent: and the last adjudication on the case was, that although the lessees had entered generally, yet they might afterwards elect either to take by the demise, or by the bargain and sale, for that their general entry could not be any determination of the election.^v

If the vendee in a bargain and sale, before enrolment thereof take a fine from the bargainer, or livery and seisin; he will take by the livery or fine, and not by the deed and enrolment. For when property is conveyed to a purchaser under two modes of conveyance, the one operating at common law, the other under the statute of uses, and the common law conveyance is complete and made perfect before that operating under the statute; he will be considered to take under the former mode of conveyance; since when the common law and statute law concur, the common law shall be preferred.^w

Thus where a reversion was conveyed by bargain and sale to a purchaser in fee, and before the same was enrolled the vendor levied a fine to the purchaser and his heirs, and the bargain and sale was afterwards enrolled within the six months; it was resolved that the conusee should be in by the fine, and not by the deed enrolled; for that when the fee-simple passed by the fine to the conusee and his heirs, the enrolment of the deed afterwards could not divest and turn the estate out of himself, which was absolutely settled in him by the fine. But it is reported to have been said by some of the judges, though the point was not resolved, that if the enrolment should be presumed to have been made at the same time the fine was levied, the bar-

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cution.*

^v And see Hob. 159. 4 Co. ^w Inst. 672. 1 Leon. 6. 2 Co. Rep. 72 a. 2 And. 161. in Mal. Rep. 35 b.
o'ry's ca.

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gaine should have election to take the reversion by the one conveyance or the other.^a

And where one granted bargained and sold a manor to others in fee, and afterwards livery of seisin was made on a part of the manor in name of the whole, and within six months the deed was enrolled according to the statute; on the question whether the manor passed by the feoffment or the deed enrolled, it was agreed that it passed by the livery and seisin; for that by the livery it appeared to be the intention of the parties that the manor should pass by the feoffment, and because the statute enacted that no use should pass by bargain and sale only^b, except it was by deed indented and enrolled, whereby it appeared that all other conveyances by the common law remained; therefore the conveyance by the common law should be preferred, and the other not be referred to the time of the bargain and sale, and so defeat the feoffment.^c

**Reason for
 the opera-
 tive words
 in bargain
 and sale for
 a year.**

And in the familiar case of a bargain and sale for a year to vest possession, the reason why words of bargain and sale only are made use of, and not words which would have the effect of creating a common law interest, as was formerly the case, is, in order to preclude any question from arising whereby preference might be given to the latter words in derogation of the former; it being held, that where conveyances may operate both by the common law and statute, they shall be considered to operate by the common law, unless the intention of the parties appears to the contrary.^d

**Where in-
 tention will
 prevail.**

Where however an instrument purports both to appoint a use, and also to convey an interest, it will be held to operate in that mode which will best effectuate the intention of the parties.^e

^a Hynde's ca. 4 Co. Rep. 70 b. 71 a.; and see Mo. 337, 338. in pl. 456. Cro. El. 917. Cro. Car. 218. Popl. 49. 1 Brownl. 142. 1 And. 27. 115. 2 And. 161. 203. Yelv. 123, 124. Ow. 70. 1 Mod. 176. 2 Rol. Ab. 787. Hob. 159.

^b Of an estate of freehold must of course be understood.

^c Bracebridge's ca. 1 And. 118. 1 Leon. 5.

^d See Co. Lit. 271 b. n. (1). vi. 2. [17th ed.]

^e Cox v. Chamberlain, 4 Ves. 631. Roach v. Wadham, 6 East, 289. Sug. Pow. 304.

From the case next cited, this more enlarged proposition also seems deducible; viz., that when an instrument is on its execution complete and perfect as one form of conveyance, and incomplete and imperfect as another, it shall be held to operate in its perfect form, and not be afterwards permitted to operate in its imperfect one, on the latter being rendered perfect.

Therefore where tenant in tail bargained and sold certain houses in London, and delivered the deed off the land, and also made livery of seisin of one house in the name of all, the other houses being in lease for years, the lessees whereof never attorned; the houses were adjudged to pass by the bargain and sale, and not by the livery. And Yelverton J. took a difference between several conveyances both executory, and where one was executed immediately; as in Heyward's case, the lessees, he said, were at election either to take by the bargain on the statute of 27. H. 8., or by demise at the common law, but that it was otherwise where the one was executed at the first, for there the other came too late, as in that case, by the very delivery of the bargain and sale, the land itself passed by the custom of London without enrolment, (the custom having been found by the verdict,) and that so much was expressed by the statute of enrolments which excepted London; then that the bargain and sale being executed, and the conveyance perfected by the delivery of the deed, the livery of seisin came too late, for that it was executed to him who had the inheritance of the house at the time; and that possession executed hindered possession executory.^c

Where a person is a bare trustee or medium of conveyance, it is not competent to him to make an election between two modes of operation of a conveyance, when such an election would be prejudicial to the interest of his cestui que trust, as appears from the following case cited

^c Darby v. Boice, Yelv. 123. 1 Brownl. 141.; and see 3 Leon. 16. May not the principle of this case render it material, that care be taken that the attestation of a

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by Rolle.^a If one seised in fee of land, and intending to convey it to B., for a pecuniary consideration demises grants bargains and sells it to A. for years, and then releases it in fee to A. to the use of B. in fee; this release is good before any agreement by A. to take by way of bargain and sale: and if A. afterwards elect to take by way of lease at common law, still he shall not thereby divest the estate out of B., for *prima facie* by the intent of the grantor, A. being only named as a medium for the settlement of the land upon B., was possessed as a *bargainee*; and since the release has settled the estate in B., A. cannot at his election make it void.

Election to limit use or pass interest.

It may be added, that where a person has power to limit a use over property, and also an interest in the same property, as, for instance, under the common form of limitation made use of to prevent dower attaching, he has an election either to limit the use by an exercise of his power, or to pass the estate by virtue of his interest without reference to his power.^c

Election under deeds operating solely by statute. Cases wherein election may be made.

III. In what cases there is an election to take one way or another under deeds operating solely by statute.

It seems, that whenever a conveyance deriving its whole efficacy from the statute of uses, is capable of being made to operate in more than one way under that statute, he to whom it is made may elect in which mode it shall have operation.

Therefore if a man covenants to stand seised to a use, if it be in consideration of money, and the deed, if for a freehold interest, be enrolled, it shall also enure as a bargain and sale.^f And it was said in argument in the case of *Crossing v. Scudamore*^g, after noticing the above-cited case of a conveyance by a father to his son in consideration of love and 100*l.*^h, that where two considerations were expressed in the deed, the use might arise upon

^a 2 Rol. Ab. 787. pl. 7. Gilb. Us. & Tr. 294. 505. [3d ed.]

^f 2 Brownl. 291.

^g 1 Vent. 137. 1 Mod. 175.

* See Sir Ed. Clere's ca. 6 Co. Rep. 18 a.; and see Buckhurst's ca. Mo. 493.

^h Supra, pa. 6.

either; as if a father in consideration of blood and 100*l.* covenanted to stand seized, &c. and the deed was not enrolled, yet that the use should arise as upon a covenant to stand seized.¹

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thing under
one of
several titles.*

SECTION 2.

Election considered in application to cases where one of several things may be taken under one and the same title.
*E duobus propositis unum accipere et alterum dimittere.*²

The above consideration may be discussed under the following inquiries: —

I. In what cases there is an election to take or perform one of several things under one and the same title.

*Election to
take one of
several
things
under same
title.*

II. In what cases an election to take one of several things under one and the same title, shall be said to be determined.

The rules of election applicable to the first inquiry, and under which it may be reduced, are as follows: —

1. That when nothing passes to the grantee before election to have one thing or the other, the election ought to be precedent, and made in the life time of the grantee, and his heir or executor cannot make election: but that when an estate or interest passes immediately to the grantee, there election may be made by him, or by his heirs or executors.^k

2. That when election is given to several persons, nothing vests before election, and the first election shall stand.

3. That he who is the first agent, and ought to do the first act, shall have the election.^l

¹ See further upon this subject, Vin. Ab. Uses, B. a. Hawk. Ab. Co. Lit. 83, Rol. Ab. Uses, O. 786, 787.

^j See 2 And. 2, 3. in Fulwood's ca.

^k Lutw. 805.

^l See Doug. 16. in Layton v. Pearce.

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4. That when the things granted are annual things, and are to have continuance, the election remains in the grantor, (in cases where the law gives him election,) as well after the day as before; otherwise where the things are to be performed unicâ vice.^m

5. That election may be lost by reason of the tortious acts of the party by whom it might otherwise have been exercised.

6. That the right to make an election may shift from the person by whom it was originally exercisable, to the person to be benefited, by reason of the laches of the former.ⁿ

**Election
when to
be made.**

1. For the purpose of exemplifying the first of the foregoing rules it may be observed, that if a person having three horses, give another one of them, the election ought to be made in the life time of the parties; for since no particular horse is given, the certainty, and thereby the property, begins by election.^o Therefore where election creates the interest, nothing passes till election; so that where no election can be made, no interest can arise.^p

**When it
cannot be
made.**

If a man gives one of his horses to A. and B., and afterwards A. dies, yet B. may elect; because this was a thing in interest in them, and no express election limited. But if a man gives one of his horses to be elected by A. and B.; if A. dies before election, B. cannot elect.^q

In *Bullock's case*; A. having a wood of 1000 acres, enfeoffed another of a house and seventeen acres, parcel of the wood, and made livery; and it was held that none of the wood passed before election, and therefore the heir should not make election. And Lord Coke in commenting on this case observes, if the heir of the feoffee should make the election, he would be in as a purchaser, since nothing

^m Co. Lit. 145 a. 2 Co. Rep. 37. Mo. 85. Keilw. 78.

ⁿ The above rules, with the exception of the last, are partly adopted from those of Lord Coke. See Co. Lit. supra.

^o See 2 Co. Rep. 36.

^p See *Stukeley v. Butler*, Hob. 174.

^q 1 Rol. Ab. 725. 2 Co. Rep. 36. Dy. 280, 281. pl. 17, 18, 19, 20. W. Jo. 136. Hob. 174. 222. 1 And. 11, 12. Mo. 81. pl. 215. Benl. 148. pl. 206.

passed of the seventeen acres to the feoffee before election; and that by law the heir could not be a purchaser, for the words "his heirs" were words of limitation.^{*}

And if a feoffment be made of two acres, to hold the one for life and the other in fee, the heir shall not make election.^{*}

But when an election is coupled with an interest, the same is descendible.^{**}

Thus where A. leased to B. forty acres, parcel of sixty, and B. before election made, died; on the question whether this lease was not void by the death of B., or whether his executor might make election, the Court held that election might be made by the executor, and distinguished between a lease for years, and a feoffment, the latter of which would be void, because a livery could not operate in futuro.^{*}

If however two acres be given to another, habendum one acre in fee, and the other in tail, and he alienes both, and hath issue, and dies; the issue may bring a formidion in the descender for which acre he will; the election not being determined by the donee's death, since an estate passes presently by the livery; and the issue shall take by descent.^{*}

2. That when election is given to several persons, nothing vests before election, and the first election shall stand.

Thus if a lease for life be made of two acres, the remainder of one to A., and of the other to B.; he who first

* The reader may here be reminded, that in consequence of the liberality extended to the construction of wills, where the testator's intention has appeared manifest, a limitation to the heirs of a person living, has been adjudged a sufficient designation for the same to vest, notwithstanding the rule that *nemo est heres viventia*. See *Goodright v. White*, 2 W. Black. 1010. and ca. there

referred to. *Feerne cont. rem.* 209. [7th ed.]

[†] *2 Rol. Rep. 485. in Hurd v. Poy;* and see *Lutw. sbs. in Eastcourt v. Weekes.*

[‡] *Lutw. sbs.*

[§] *Jones v. Cherney, Freem. 530.;* and see *1 Rol. Ab. 725. Mo. 102.*

^{**} *Ca. put 2 Co. Rep. 56.;* and see *Mo. 85.*

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things
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When de-
scendible.

Election in
several
persons.

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First agent to have election.

Exceptor to have election.

makes election shall enjoy the one acre, and thereby the other acre hath vested in the other.^x

But if a feoffment be made of two acres, to hold the one to the use of the feoffor and his heirs, and the other to the use of the feoffee and his heirs; the election is given to the feoffor, and not to the feoffee, the former being the first named: but if the feoffee had been the first named in the limitation of the use, then he would have had the first election. And if two acres be given to another, to hold the one to himself and his heirs male, and the other to himself and his heirs female; in this case if he has issue a son and daughter, the election is given to the heir male, because he is first named in the limitation of the gift.^y

3. That he who is the first agent, and ought to do the first act, shall have the election.^z

Perkins thus lays down the rule: — of every thing uncertain which is given or granted, election remains to him to whose benefit the grant or gift is made. As if a feoffment be made of two acres, namely, of one in tail and the other in fee, without shewing in which acre the feoffee shall have a fee, or in which an estate tail; the feoffee may elect in which acre he will have a fee, and in which an estate in tail.^a

And if a fine be levied of a house and 100 acres of land in D., where the conusor hath a house and 118 acres; the conusee may elect which 100 acres he will have, the election being given to him by the fine. But if the conusee render the 100 acres back to the conusor for certain years, the conusor hath the election.^b And if two acres be devised out of four lying together, the devise is good, and the devisee shall have election.^c

But where A. seised of a manor, aliened the same, except one close, parcel of the manor, called N.; and there

^x Ca. put 2 Co. Rep. 56. Co. Lit. 145.

^y Mo. 85. in pl. 215.

^z See accord. Doug. 16.

^a Perk. ss. 75, 75.; and see 1 Rol. Ab. 725. Mo. 85.

^b Mo. 102. in pl. 247.; and see ibid. 84. Dy. 280. mar. pl. 17. 1 Rol.

Ab. 725.

^c Dy. 280. mar. pl. 17,

were two closes known by that name, the one containing nine acres, the other three; the Court held that the alienee should not choose which of the closes he would have, but the alienor should have the election.^d And if one grant or sell trees growing upon his land, excepting to himself a certain number of them, the exceptor is to have the election.^e

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several
things
under the
same title.*

If a rent of 20s., or a robe, be granted to another, the grantor shall have the election, he being the first agent by payment of the one or delivery of the other.^f So if a lease be made yielding rent, or a robe, the lessee for the same reason shall have the election. But if I give you one of my horses, there you shall have election, for you shall be the first agent by taking or seizure of one of them. And if one grant to another twenty loads of hasel, or twenty loads of maple, to be taken in his wood of D., the grantees shall have election, for he ought to do the first act, namely, to cut and take them.^g

In the case of a heriot, when the tenure is by the best beast, the lord being the person to be benefited, is to have the election; and that shall be said to be the best which he thinks the best; and the lord will be bound by his election, although he should not take the best beast of which the tenant died possessed.^h But where the render is of an ox or other beast, and not defined to be the best, the election is in the tenant if he has more than one of that description of animal.ⁱ

*Election of
heriot.*

And if a man devise to A. one of his horses, or a horse, A. shall have the election, if there be more than one, which horse he will have: but if the devisor direct that his executor shall deliver to A. one of his horses, the executor hath the election, and may deliver which of them he will.^j

*Where ex-
ecutor has
election.*

^a 1 Leon. 268. pl. 360.

^b Vin. Ab. Elec. (B.) pl. 12. Per

^c 2 Bulst. 7. in Billingsly v. Fleming C.J. 2 Bulst. 9. in Billingsly v. Hersey. Cro. El. 590. in

Hersey. Bro. Ab. tit. Dette, pl. 113. Odiham v. Smith. Bro. Ab. tit. Ha-

^d Dy. 91. in pl. 11. Plow. Com. 132. Mo. 83. 85. Perk. s. 74. 2 Co. Rep. 37.

riots, pl. 11. Hob. 60. Plow. Com. 96.

^e Scriv. Cop. 425. 437. [2d ed.]

^f Shep. To. 447. [7th ed.]

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Election to take one of several things under the same title.

What passes before election.

Where grantor has election.

Where election may be lost.

If one grant to another 200 faggots, to be taken out of all his lands, or 20s. for the same out of his lands, habendum the 200 faggots or 20s. to him and his heirs, with clause of distress to him and his heirs for the one or the other, at the election of the grantees; in this case the faggots pass in interest to the grantees immediately before any election, with a power to elect to have the 20s.; but the 20s. do not pass in interest before election, because they are granted for the same, that is, if he will not have the faggots. So that upon a general grant of all hereditaments, &c., the faggots will pass before any election made.^k

4. That when the things granted are annual things, and are to have continuance, the election remains in the grantor, (in cases where the law gives him election,) as well after the day as before; otherwise where the things are to be performed unicā vice.

Therefore if an annuity or robe be granted to another for life at the feast of Easter, and both are behind, the grantees ought to bring his writ of annuity in the disjunctive; for if he should bring it for one only and recover, the judgment would determine his election, and he should never have a writ of annuity after, but a scire facias upon the judgment. But if one contract with another to pay him 20s. or a robe, at the feast of Easter; after the feast he may bring an action of debt for the one or the other.^l And if a lessor reserve yearly a rent, or a pair of spurs, and the lessee fail of payment at the day, the lessor may distrain for either of them.^m

5. That election may be lost by reason of the tortious acts of the party by whom it might otherwise have been exercised.

As if a feoffment be made of two acres, to hold the one for life, the other in tail, and the feoffee before election makes a feoffment of both; the feoffor shall enter into which acre he will, for the act and tort of the feoffee.ⁿ

^k Southwell and Wade, 2 Rol. Ab. 47. ^m Co. Lit. 90b.
^l Co. Lit. 145a. ⁿ Co. Lit. 145a.

6. That the right to make an election may shift from the person by whom it was originally exerciseable, to the person to be benefited, by reason of the laches of the former.

If therefore land be leased for years, reserving weekly nine quarters of wheat, or the value thereof as it shall then be sold in the market of W.; and the lessee pays neither of these at the time appointed; the lessor may have his action for the wheat only, or for the value only; for though the lessee might have paid either of them at the day, yet after the day the law gives the election to the lessor.^o

And upon an obligation to pay a sum of money or certain goods by an appointed day; before the day the obligor has election to tender which of them he will; but after the day the obligee has election to demand which of them he will.^p

If 300 cords of wood be sold to another and his assigns, to be taken by the appointment of the bargainer, and the bargainer does not assign them within a convenient time after request made by the bargee, he may take them without appointment: and he has an interest before the appointment of the bargainer, which he may assign to a third person.^q

II. In what cases an election to take or perform one of several things under one and the same title, shall be said to be determined.

If two acres be given to another, to hold the one for life, and the other in fee, and the donee afterwards makes a feoffment of one acre; this is an election to have the fee in that. And if a lease be made of two acres for life, the remainder of one acre in fee, and the lessor afterwards licenses the lessee to cut trees in one acre; this is an election that he shall have the fee in the other acre.^r And where

^o 1 Rol. Ab. 725.

Reservation, pl. 3. Hob. 174. 5 Co.

^p Bro. Ab. tit. Dette, pl. 160.

Rep. 25a.

^q Maynard v. Bassett, Mo. 691. ^r Mo. 83. in pl. 215. 1 Rol. Ab. pl. 955. Cro. El. 819. pl. 14. 1 Rol. 726. Plow. Com. 6. Perk. s. 78. Ab. 725.; and see 2 Bulst. 7. in Co. Lit. 145a. n. (3). [17th ed.] Billingsley v. Hersey. Bro. Ab. tit.

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there was a reservation of money or turkeys on a lease for years, the lessor's bringing an action for the money was an election. *

Where a house was devised upon condition that the devisee saw the testator's mother well provided for during life, or gave her 20*l.*; and the jury found that the mother had lived with the devisee for two years, and was well provided for during such time, but had afterwards left him, and requested the 20*l.*: the Court held, that the devisee had election either to pay the 20*l.*, or otherwise to provide for the mother; and that by having suffered her to dwell with him, he had made his election, and was not bound to pay the 20*l.*.^t

SECTION 3.

In what cases the operation of deeds, &c. will be reduced to a certainty in consequence of an exercise of election.

Election
on the
operation
of deeds.

The following examples will serve to illustrate this inquiry: thus, if there be tenant for life of three houses and four acres of land, and the reversioner grant two of the houses and two of the acres of land; this is a good grant, and hath sufficient certainty in it after having received its perfection from election, which must be made in the lifetime of the grantor and grantees. And if one grant to another a rent or a robe, 20*s.* or 40*s.*, or common of pasture or rent, in the disjunctive; the grant which is at first uncertain, may yet become good; for if the grantees make the election, or the grantor pay the rent or perform the grant on either part, the grant is good.^u

So if one seised of two acres of land, leaseth them for life, and granteth the remainder of one, without expressing which, to A.; if A. make his election which acre he will have, the grant of the remainder to him will be good.^v

* Lutw. 655. in Letten v. Winne. ^v Perk. s. 76. Shep. To. 251.

^u Shawe's case, Palm. 76. [7th ed.] Plow. Com. 15.

^u Perk. s. 75. Shep. To. 250,
251. [7th ed.] Plow. Com. 13.

But it is said, that if a house be granted excepting one chamber, or a manor excepting one acre, without setting forth which chamber or which acre it shall be, these exceptions are void. And that if one having two tenements, grant the reversion of one of them, without saying which, this is void for uncertainty.^w To these positions however Mr. Preston in his edition of the Touchstone^x subjoins a quære, whether in the former the exception, and in the latter the grant, may not be made good by election; and the case cited from Leonard in a former page^y, seems fully to warrant the propriety of Mr. Preston's doubt upon the point of exception.

If one grant to another so many of his trees or of his horses as may reasonably be spared, this grant is void, there being no means of reducing it to a certainty.^z But if one grant to another so many of his trees as A. shall think fit, or 100 loads of wood to be taken by the assignment of the grantor, or by the assignment of A.; or three acres of wood towards the north-side of the wood; these it seems are good grants, and certain enough.^a

And if one grant twenty acres, parcel of his manor, without any other description of them, yet the grant is not void, for an acre is a thing certain, and the situation may be reduced to a certainty by the election of the grantee. But if he sell 20*l.* worth of his land, parcel of a manor, this is void, it being neither certain in itself, nor reducible to a certainty, since no man is made judge of the value.^b

If a common person grant to another the moiety of a yard-land in a great waste, without certainty in what part of the waste he shall have the same, or the special name of the land, or how it was bounded; this may be reduced to a certainty by the election of the grantee.^c But if such a

^w Perk. ss. 641. 643. Shep. To. 79. [7th ed.]

^a Mo. 882, in. pl. 1236. Stukeley v. Butler, Hob. 168. 174. Shep.

^x Shep. To. 250. [7th ed.]

To. supra; see also Bro. Ab. tit.

^y See the case stated *supra*, pa. 16. and 17., for which 1 Leon. 268. pl. 360. is cited.

Done, pl. 19. 1 Wood Conv. 669. Plow. Com. 15.

^z Shep. To. 251. [7th ed.]

^b Keil. 84. 3 Bac. Ab. 392.

^c Sir Walter Hungerford's ca. 1 Leon. 30.

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grant be made by the King, it is utterly void for the uncertainty.^d And if the King grant 120 acres of his waste in D., and the ad quod damnum return that it is not to his damage, and that the waste contains 300 acres; there nothing passes, it being uncertain which 120 acres were intended, and the party shall not have any election against the King.^e

The operation of a deed of exchange may be rendered certain and complete by election. As if three acres of land, with an advowson appendant, be given in exchange by A. to B., for a chamber to be assigned by B. at the election of A., and B. assign two chambers, and A. choose and enter upon one, and B. enter upon the land; this exchange is good, notwithstanding the uncertainty.^f

And the commencement of a lease may be rendered certain by an exercise of election. Thus if A. seised of lands in fee, grant to B. that on payment by him of 20s., he shall occupy the lands for twenty-one years; if B. afterwards elect to pay the 20s., there is a good lease for twenty-one years from the time of payment. For a lease before it takes effect in possession or interest, may depend upon an uncertainty, viz. a possible contingent, or upon a limitation or condition subsequent.^g

As to election by cestui-que use.

It appears to have been heretofore considered uncertain, whether the right of making an election was exercisable by a trustee to uses, or his cestui-que use. Therefore where A. covenanted to execute an estate of a certain manor, as to part, viz. of the annual value of twenty marks, to the use of B., and C. his intended wife, for their lives, and after marriage to the use of them in tail, with remainder to B. in tail, remainder to A. in fee; and as to the residue, to the use of A. for life, remainders over as before; and A. afterwards executed the estate accordingly by feoffment fine and recovery; one of the questions being to whom an election was given of land of the annual

^d 3 Bac. Ab. 591.

^f Perk. s. 264. Shep. To. 293.

^e Brand v. Todd, Noy. 29. 12 Co. [7th ed.]
Rep. 86 b.

^g Co. Lit. 45 b. 1 Rol. Ab. 849.

value of twenty marks, the Judges are said to have thought, that upon estates executed to uses of a thing uncertain till election, the election ought to be made by the feoffee or connsee to the use, and this as well since the statute of 27. H. 8. as before. But this opinion is made questionable by the reporter, who observes, that in the principal case the election was limited to the use, and so the possession of all passed to the feoffees, and the use was distributory by election; whereby it seemed reasonable, that he who was to take the use, was to make the election. But it was agreed by all, that the limitation of land of the value of twenty marks, was not void for uncertainty, because it might be made sufficiently certain by election. And it is also said to have been agreed, that if an election be originally given to a cestui-que use tenant for life, and he make no election during his life, yet he in remainder may elect after his death; but that if such cestui-que use make an election in his life-time, he in remainder will be concluded by the election: and it was added, that this real election was a descendible inheritance, so that the heir should elect if the ancestor did not do so in his life; and that the election of a tenant in tail should prejudice his issue.^b

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Election by
tenant for
life will
bind re-
mainder
man.
By tenant
in tail will
bind his
issue.

In the following case it seems to have been admitted that the right to elect resided in the cestui-que use: for where a fine was levied by A. of five yard-land, to the use of himself for life, remainder to the use of B., his eldest son, and C. his wife, and the heirs of the body of B.; with a proviso that if B. died before A., C. should have a yard and half land for A.'s life, without showing what yard and half in certain; and on B.'s death, C. elected, and entered on a yard and half land: it was adjudged that the use for the life of A. in land elected by C., ceased without entry, and that C. being a cestui-que use, should have election.ⁱ

^b Calthrop's ca. Mo. 102. Tenant in tail may determine his election as to so many acres or a rent-charge, and the issue shall be bound by it. See Hardr. 384. Perk. s. 77. ⁱ Marshal v. Marshal, Mo. 602. pl. 832.

SECTION 4.

Election considered in application to conditions and covenants.

Election upon alternative conditions.

Election in an obligor.

Deprivation of such election by obligee.

Deprivation by act of God.

I. As to conditions whereupon there arises an election to perform one of several things.

When the condition of a bond is in the disjunctive, the obligor has election to do one thing or the other, the condition being for his advantage: and when a request is necessary to be made by the obligee to the obligor to perform one of the things, it does not take away the election of the latter.^j

But if a person under an obligation to perform one of two several things, be deprived by the conduct of the obligee of his election to perform one of the things, he will be excused from performing the other.^k

As where the condition of a bond was, to deliver certain obligations to the obligee before a specified day, or before that day to execute such a release as his counsel should devise: it seems to have been adjudged by three justices, that the obligor having election to make the delivery, or execute the release when devised, if the obligee neglected to have the necessary release prepared, the obligor was discharged from the condition.^l

And if an obligor having an election to perform one of two things, both of which are possible at the time of the obligation being made, be afterwards prevented from performing one of them by the act of God, he will be excused from the performance of the other also.^m

Thus where the condition of a bond was, that if the obligor and his wife sold the wife's land, the obligor during

^j Bro. Ab. tit. Conditions, pl. 161. Kerne's ca. Mo. 241. pl. 377. Ibid. 246. pl. 587. It is conceived however that equity would relieve in such a case.

^k Shep. To. 383. 393. [7th ed.]
^l Greningham v. Ewer, Cro. El. 396. pl. 1. Shep. To. 395. [7th ed.] But see Mo. 395. pl. 515.; and see Basket v. Basket, 2 Mod. 200.
^m See 5 Co. Rep. 22 a. Shep. To. 383. 393. [7th ed.]

his life should purchase unto the wife and her heirs so much land and of such value as that sold, or should leave her so much money or money's worth after his death; and on debt being brought on the bond, the husband pleaded the death of his wife; and the plaintiff replied that the husband and wife had aliened her land, and that the husband had not purchased so much other land to the wife and her heirs; to which the husband demurred: judgment was given for him, because the condition gave him election to purchase other land, or leave money or money's worth, of which election he was deprived by the death of the wife, which was the act of God; and being in law discharged from one part of the condition, the entire condition was gone.^a But it is said, that if a condition be to make the obligee a lease for life by such a day, or pay him 100l., and he dies before the day, his executors shall have the 100l.^b

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And it is laid down by Lord Coke, that in all cases where the condition of a bond, recognizance, &c. is possible at the time of making the condition, and before the same can be performed the condition becomes impossible by the act of God, or of the law, or of the obligee, there the obligation, &c. is saved.^c

But if an obligor be prevented by his own default, or the act of a stranger, from exercising an election, no advantage can be taken by him of such act or default.^d

Depriva-
tion by act
of obligor
himself,
or of a
stranger.

Therefore where to debt brought on bond, the condition whereof was to deliver the tackle of a ship, or to pay before a certain feast so much money to the plaintiff as the tackle should be valued at by four persons, the defendant pleaded that the four persons had made no valuation: upon the plaintiff's demurring thereto it was adjudged for him,

^a Eaton's ca. Mo. 557. pl. 485. pl. 2. And the ground of the last But see the other case cited there, cited case was denied to be uni- and note the quære. Cro. El. 398. versal. But see Wood v. Bates, pl. 5. 5 Co. Rep. 21. name of W. Jo. 171. and 1 Fon. Eq. 221. Laughter's case. Shep. To. 395. n. (q).

[7th ed.]

^b Per Treby C.J. 1 Salk. 170.

^c Co. Lit. 206 a.

^d Shep. To. 385. 393. [7th ed.]

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arising
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Election
upon mort-
gage and
other con-
ditions.

Election
upon con-
ditions giv-
ing a right
of re-entry
upon, and
operating
to the
avoidance
of estates.

As to con-
ditions an-
nexed to
estates of
freehold or
inheritance.

because the defendant ought to have procured the four men to value the tackle.¹

If by the clause of defeasance contained in a mortgage, the money is appointed to be paid either to heirs or executors disjunctively, the mortgagor may elect, in case the money be paid precisely at the day, and the mortgagee be dead, to pay it either to his heirs or executors. But when the precise day is past, all election is gone at law; and the case being then reduced to an equity of redemption, that redemption is not to be upon payment to the heirs or executors, but upon payment to the latter only.²

And if a feoffment be made on condition that the feoffee pay the feoffor, his heirs or assigns, so much money on such a day, and before the day the feoffor appoints his executors and dies, the feoffee may pay the money either to the heir or executors. And if the condition be for the feoffor to pay money to the feoffee, his heirs or assigns, and the feoffee makes a feoffment over, it is in the election of the feoffor to pay the money to the first or second feoffee. And if the first feoffee dies, the feoffor may either pay the money to the heir of the first feoffee, or to the second feoffee.³

II. As to conditions giving a right of re-entry upon, and operating to the absolute avoidance of, estates: and herein

1. In what cases, on conditions broken, there arises an election either to avoid the estates subjected to the conditions, or to continue the same.

Generally speaking, where estates of freehold or inheritance are limited subject to conditions, upon the breach of which either a re-entry is given, or the estates themselves are made to determine; they will not so absolutely cease on the commission of any breach, as to render it unnecessary that any further step should be taken by those

¹ Moore v. Morecombe, Mo. ² See 1 Ch. Ca. 285. in Thorn-
645. pl. 892. Cro. El. 864. pl. 42.; ³ Brough v. Baker. 2 Fon. Eq. 280.
and see Studholme v. Mandell, n. (e). ⁴ Co. Lit. 210 a.
1 Ld. Raym. 279.

persons to whom it is competent to take advantage of the conditions broken, but an entry^a or claim, as the case may require, must be made by them, previously to their being in a situation fully to avail themselves of such breach of any conditions as may have been committed.^v

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upon con-
ditions and
covenants.

As if a feoffment be made upon condition, and the same be broken, the feoffor may lawfully enter; but the freehold will not be in him until an entry has been made.^v

So if a man grant an advowson to another in fee, upon condition that if the grantor pay a certain sum on such a day, the estate of the grantee shall cease and be utterly void; though payment be made at the day, yet the estate will not be revested in the grantor before a claim, which in this case must be made at the church. And so it is of reversions, remainders, rents, commons, and the like, and whether the estates be created by deed or by devise.^x

The consequence therefore of an entry or claim being necessary to the full revestment of estates rendered de-feasible by the breach of conditions is, that an election may be exercised by those entitled to take advantage of a breach of them, either to avoid such estates, or to continue the same.

And if a lease be made either for a freehold or chattel interest, rendering rent, and containing a condition that if the rent be unpaid by a specified time, it shall be lawful for the lessor to re-enter upon the property leased; in this case, supposing the rent not to be paid pursuant to the terms of the condition on the same being demanded by the lessor, (unless such demand be by consent of the parties expressly dispensed with^y,) there arises to him an election either to avail himself of the breach of the condition, and invalidate the lease^z, or to dispense with such breach by

As to con-
ditions of
re-entry in
freehold or
chattel
leases.

^a In order to sustain an ejectment, an actual entry is requisite only where a fine with proclamations has been levied.

^v Lit. s. 551.

^x Co. Lit. 218 a.

^y 5 Co. Rep. 40b.

^z See also the process pointed

^z Co. Lit. 218 a. The exceptions to the rule are stated *ibid.* and 218 b.

out by stat. 4. G. 2. c. 28.

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ditions in
chattel
leases de-
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the estate.**

the acceptance of rent or other confirmatory act, and thereby affirm the lease.

And upon the breach of conditions of re-entry annexed to any collateral acts, there arises a similar election: as if in a lease for years, there be contained a condition of re-entry on the lessee's assigning without the licence of the lessor.*

But as to this power of election in lessors to dispense with or enforce the consequences of a breach of conditions, we find, with respect to leases made for chattel interests, a difference taken in books of high authority between conditions, on the breach of which a right of re-entry only is given, and conditions, on the breach of which the estates themselves are made absolutely to cease: — that in the former case, an election may be exercised by the lessors on a breach of the conditions being committed; but that in the latter, no such election can be exercised, since the leases themselves become ipso facto void, and incapable of being afterwards restored to their former state of existence by the acceptance of rent or other affirmative act^b: it being said, that a lease for years may begin and end without ceremony; but that an estate of freehold cannot begin nor end without ceremony.^c

On the other hand authorities are not wanting to show, that if in a lease for years there be contained a condition making the same void on non-payment of the reserved rent within a specified time, and a breach is committed of such condition, yet a previous demand of the rent by the lessor is necessary to the absolute avoidance of such a lease; since, if it were otherwise, the lessee would have it in his power to rid himself of the lease on any rent day he thought proper by omitting to pay the rent within the required

* See *Goodright v. Davids*, Willes, 176. n.(a). *Plow. Com.* Cowp. 803. 156. in *Browning v. Beston*. *Shep.*

^b *Co. Lit.* 215a. 3 *Co. Rep.* 64b. ^c *Co. Lit.* 214b. 3 *Co. Rep.* 64b. *T. 139.* 151. 154. [7th ed.]
Sir Moyle Finch v. Throckmor- *65a.* 8 *Co. Rep.* 95b. *Plow. Com.*
ton, Cro. El. 220. *Cro. Car.* 512. *135,* 136.
2 Leon. 141. 1 *Rol. Ab.* 475. 1 *And.*
304, 305, 306. *Godb.* 47. 2 *Salk.* 4.

period, and thereby take advantage of his own wrong to the obvious prejudice of the lessor.^d

Previously therefore to the decision about to be noticed, it could not with any degree of certainty be predicated, whether, where a condition for the benefit of the lessor was contained in a lease for years, on a breach of which the same was to become void, the lessee could take advantage of any breach, or the power of so doing rested solely with the lessor.

The point however was set at rest in Hilary term 1817 by a case in which it was decided, that where a lease for years was made, upon condition to be void on the happening of certain events within the power of the lessee, a breach of such condition could not be taken advantage of by a surety of the lessee as a defence against the lessor's title to recover, nor, as it appears to follow, by the lessee himself.^e

This case having moreover in effect decided, that a previous demand or claim is essential on the part of the lessor, in order fully to induce the consequences of a breach of such conditions contained in a lease for years as tend to his benefit, and go to the entire avoidance of the estate; it follows that such a breach will afford a subject of election to the lessor, equally with the breach of a condition giving a right of re-entry: for if in the first case the commission of some act be necessary for avoiding the lease, it is also competent to the lessor to commit an act which will have the effect of confirming it.

These principles have received further illustration from a recent case, wherein it appeared that a lease for years of coal mines contained a proviso, that if the same should stop or cease working at any time two years, the lease should be void: and it was held, that the lease did not become absolutely void by a cesser to work for two years,

^d See Couston's ca. Dy. 28. Jo. 9. 1 Rol. Ab. 459. 4 Bac. Ab. pl. (182.) in mar. Ibid. 222. pl. 21. 124.
Sid. 7. in Young & Wright. Han-
son and Norcliffe, Hob. 331. W. 2 Pr. Conv. [2d ed.]

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unless the lessor thought fit to make it so, but voidable only at his election; that he was not bound to exercise that election in the first instance; and though he might waive it from time to time, yet that he was at liberty afterwards to insist on the forfeiture in respect of subsequent misconduct; and that he might avail himself of a forfeiture which became complete on any day subsequent to that on which he had received rent.^f

Supposing however there be contained in a lease for years a condition, on the breach whereof it is declared that the estate shall absolutely determine, *and such condition be introduced for the benefit of the lessee*; then it seems that the event, on the happening of which the condition will be broken and the lease defeated, will be considered as forming a collateral determination to the estate, or part of the limitation, rather than a condition.^g

With respect to leases made for a freehold interest containing conditions, whether the same provide that the lessors shall have a power of re-entry only on a breach of them being committed, or that the leases shall upon that event absolutely cease and determine; an entry^h will

^f Doe v. Bancks, 4 Bar. & Al. 401.
^g Shep. To. 284. [7th ed.] It may not be deemed irrelevant to submit an observation or two in this place respecting the ces-
ser of terms of years created by deeds and wills.—When a term is limited to trustees by deed or will upon certain specified trusts, and the usual proviso is introduced, expressing that the term shall cease on the trusts being per-
formed; in the event of the trusts being satisfied in any way so as to call the proviso of ces-
ser into operation, it would seem that the term must cease by force of the proviso, and that there are no means of keeping it alive. (See Sug. V. & P. 561. [5th ed.]) If this be so, no reliance can of course be placed on such a term as a protection against incum-
brances. Yet it is frequently seen,

that an assignment is assumed to be made of such a term, and that in the instrument of assignment a recital is usually introduced, stating the trusts of the term to have been fully performed; and the persons beneficially interested under the trusts, are sometimes made parties to the assignment, in order to signify their acquiescence in what is stated as to the term having performed its office, and its assignment by the trustees.

The object of the foregoing re-
marks is, to guard those whose particular attention may not have been drawn to the subject, from being inadvertently induced to place reliance on a term circum-
stanced as above, as a protection against any charges that may have been effected upon the freehold subsequently to its creation.

^h See note, supra pa. 27.

As to con-
ditions in
freehold
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upon, and
those de-
termining
the estate.

in either case be necessary on the part of the lessors to perfect their absolute cessation : the consequence of which therefore is, that such breach of the conditions may be either taken advantage of by the lessors, or at their election dispensed with by the acceptance of rent or other act of affirmation.

2. The commission of what acts by persons entitled to avail themselves of the breach of conditions, does and does not preclude their election so to do.

Since, upon the breach of the conditions above spoken of, an election may be exercised by those competent to take advantage of the breach, either to determine the voidable estates, or to continue the same ; it is to be considered what acts will have the effect of determining that election.

First then, if, upon a feoffment made reserving rent and in default of payment a re-entry with a clause of distress, the rent become in arrear, whereby the condition is broken, and the feoffor distrain for the same ; he shall never enter for the condition broken, though he may receive such rent and yet enter for the condition broken. — But if he accepts rent due at a day after, he shall not enter for the condition broken, since he thereby affirms the lease to have continuance.¹ In such cases however the condition is discharged for the particular time only, and not wholly destroyed.²

And if a lease be made, upon condition that the lessee shall do no waste ; — if waste be afterwards committed, and the lessor accepts rent, he cannot enter.³

So if a breach be committed of a condition contained in a freehold lease, whether the condition give a right of re-entry, or express that upon the breach of it the lease shall be void ; acceptance by the lessor of rent due at a day after, will, in either case, bar him of his re-entry, and affirm the lease.¹ But acceptance of a collateral thing is said to be no bar to a title of freehold.⁴ And if the lessor distrain

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ditions and
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ditions
broken
when de-
termined.*

¹ Lit. s. 541. Co. Lit. 211b.

¹ 3 Co. Rep. 64b. 65a.

¹ Shep. To. 159. [7th ed.]

² 2 Salk. 3.

¹ Godb. 47.

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for the rent, for the non-payment of which the condition was broken, this also will affirm the lease.ⁿ

But it is said, that if, in the case of a lease for life, the lessor accepts the same rent which was demanded, he thereby affirms the lease and bars his re-entry, since he could not receive the rent as due on any contract, as in the case of a lease for years, but ought to receive it as his rent, and then he affirms the lease to continue, for that when he accepted the rent, he could not have had an action for it.^o

So if a lease for years be made, with a condition of re-entry on the rent reserved being behind; and the rent on being demanded is not paid, and the lessor before any re-entry made, accepts of rent due at a day after; he thereby dispenses with the condition; for the same being annexed to the rent, and the lessor having demanded the rent, he well knew the condition was broken. — And if he distrains for the rent for which a demand was made, he thereby affirms the lease to have continuance after the rent received, for when the lease is determined, he cannot distrain for the rent. — But the acceptance at a day after of the rent for which a demand was made, will not preclude the lessor of his entry for the condition broken: and as well before as after his re-entry, an action of debt for the rent may be sustained.^p

And where an ejectment was brought on the 4. G. 2. c. 28. s. 2. for the forfeiture of a lease, there being half a year's rent in arrear, and no sufficient distress on the premises; Aston J. said, he believed that there, acceptance of rent afterwards by the landlord had been held a waiver of the forfeiture of the lease; which might well be, since

ⁿ 1 Rol. Ab. 475. Plow. Com. 155. 156. in *Browning v. Beston.*

^o 3 Co. Rep. 65a.

^p 3 Co. Rep. 64 b. 1 Rol. Ab. 475. Plow. Com. 133. in *Browning v. Beston;* and see *Green's ca. Cro. El. 3. pl. 6.* 1 Leon. 262. pl. 548. *Goodright v. Davids,*

Cowp. 803. 2 T. R. 450. in *Roe v.*

Harrison. But acceptance of rent accrued due subsequently to the expiration of a notice to quit, does not of itself constitute a waiver of such notice. See *Cheny v. Batten,* Cowp. 243.

it was a penalty; and that by accepting the rent, the party waived the penalty.⁴

Another instance of waiver is afforded by a case where a lessor, after proceeding in ejectment against his tenant on a proviso for re-entry for non-payment of rent arrear, brought covenant for half a year's rent due subsequently to the day of demise laid in the declaration of ejectment; and the defendant paid the money into court in pursuance of a rule for that purpose: and it was held, that the plaintiff had waived his right of entry for the forfeiture, since by bringing the action of covenant, he admitted the defendant to be in by virtue of the lease; and that the bringing the money into court was equivalent to acceptance.⁵

But though the breach of a condition will be dispensed with, and the lessor's election to avoid the estate subjected to the condition be precluded, by the acceptance of rent subsequently accrued due, and before any re-entry; yet if such acceptance be made in ignorance of the condition having been broken, it will not have the effect of dispensing with the forfeiture incurred by a breach of the condition:⁶ neither will the affirmation of a voidable lease by parol for money or other consideration avail the lessee; nor will the acceptance of rent which is not due to the acceptor bind him.⁷

Thus where a lease for years was made of a messuage and lands, rendering rent, upon condition that the lessee should not parcel out the land nor any part thereof from the house; and the condition having been broken, the lessor subsequently received rent of the lessee, without, as it seems, being aware that any breach of the condition had been committed; such acceptance was held not to preclude him of his entry.⁸

⁴ See Cwop. 247. in Cheny v. Marsh v. Curteys, Cro. El. Batten. 528. 3 Co. Rep. 65 a. Mo. 425.

⁵ Roe v. Minshal, Selw. Ni. Pri. pl. 594. 1 Brownl. 78. 3 And. 42. 698. 90. Noy. 7. 1 Rol. Ab. 427.; and

⁶ 3 Co. Rep. 92 a.; and see Roe v. Harrison, 2 T. R. 425. see Pennant's ca. or Harvey and Oswald, 3 Co. Rep. 64. Mo. 456.

⁷ 3 Co. Rep. 64 a, b. Cro. El. 553. 572.

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determined.

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nants.

And a mere knowledge of and acquiescence in an act constituting the forfeiture of a condition, does not of itself amount to a waiver thereof, but there must be a commission of some act affirming the tenancy.^v

Neither, it may be added, does a lessor, by waving his re-entry on the breach of a covenant not to underlet, preclude himself of his right to re-enter on the commission of a subsequent breach, in case his licence was not made requisite to the commission of the first breach, and the same sanctioned thereby^w; for upon such a principle, if a landlord once knew that his premises were out of repair, and did not sue instantly, he could never after re-enter for a breach of covenant committed by their not being in repair.^x

Demand of
rent when
necessary
to the
avoidance
of leases.

In order that advantage may be taken of conditions contained in leases, either making them void, or giving a right of re-entry in case the rent be not paid by a given time, it is necessary that the rent be demanded on the land at the end of the limited time, unless such demand be expressly dispensed with by the terms of the condition.^y

For where to an action of debt for rent reserved upon a lease for years, the defendant pleaded that the lease was made with condition to be void if the rent was behind; and alleged a default of payment of the rent, and that so the lease determined; to which the plaintiff demurred: it was resolved that the lease was not void without a demand, which the defendant should have laid actually, and that for want of it his plea was bad, and so it was at the election of the lessor and his heir to continue or avoid the lease in such case.^z

And if rent be reserved payable at A. or B. upon condition, &c., the lessee hath election to pay it at either place; and therefore the lessor, in order to take advantage of the condition, must demand the rent in such places

^v Doe v. Allen, 3 Taunt. 78.

^y See 2 Pr. Conv. 190.

^w See Dumper's ca. 4 Co. Rep. 119 b.

^x Hanson and Norcliffe, Hob. 351.

^z Doe v. Bliss, 4 Taunt. 755.

where by his own agreement he has permitted the tenant to pay it.^a

3. By what description of persons an election either to avoid or affirm estates rendered voidable by the breach of conditions, may be exercised.

With respect to the persons by whom an election may be exercised either to avoid or affirm such estates as are rendered voidable in consequence of the breach of conditions contained in the instruments creating the estates, it may be observed, that by the common law, such conditions could be taken advantage of by those only who subjected the estates to the conditions, and their heirs as to real estates, and their personal representatives as to chattel interests, and not by privies or assignees in law, as lords by escheat, or in deed, as grantees or assignees of the reversion; for in no case at common law could entry or re-entry be given to a stranger: so that if at the common law a man had made a lease for life, reserving a rent, and if the rent were behind a re-entry, and the lessor had granted the reversion over, no benefit could have been taken of the condition of re-entry by the grantee.^b But by the statute 32. H. 8. c. 34. it was provided, that all grantees or assignees, and their heirs executors successors and assigns, should have the like advantages against lessees, their executors administrators and assigns, by entry for non-payment of rent or for doing waste or other forfeiture, and also by action for not performing other conditions covenants, or agreements contained in the leases or grants against the lessees or grantees their executors administrators and assigns, as the lessors or grantors themselves had.

It is observable however, that grantees or assignees shall not by virtue of this act take advantage of every forfeiture by force of a condition, but of such conditions only as are

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an election
on condi-
tions bro-
ken may be
exercised.

By whom
it may not
be exer-
cised.

^a 2 Rol. Ab. 428.

Rep. 65a. 8 Co. Rep. 95b. 10 Co.

^b Lit. ss. 347, 348. Co. Lit. 201a. Rep. 46 b. Plow. Com. 34.
n. (1.) [17th ed.] 215a, b. 3 Co.

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either incident to the reversion, as rent, or for the benefit of the estate, as for not committing waste, for keeping buildings in repair, and such like; and not of conditions for the payment of any sum in gross, delivery of corn, wood, or the like. And such persons as come in merely by act of law, as the lord by escheat, the lord that entereth or claimeth for mortmain, or the like, shall not take benefit of the statute.^c

¹ But of conditions contained in leases for years, on the breach whereof the estates created are made absolutely to determine, advantage might it is said be taken by grantees of the reversion, independently of the statute. And of conditions in law which give an entry to the lessors, advantage may be taken not only by the lessors themselves and their heirs, but also by their assignees, and the lord by escheat.^d And of limitations also advantage may be taken by strangers. As if a lease be made until A. returns from Rome, and then the lessor grants over the reversion to a stranger, and A. afterwards returns; the grantee may enter, the estate by the express limitation being determined.^e

If a lease be made rendering rent, with a condition of re-entry in case the same is not paid within a specified time, and the condition is afterwards broken, and the lessor dies without having made a legal demand of the rent; his heir cannot take advantage of the breach, but the same is discharged for ever, since that person only to whom the right of entry first accrues, can elect to take advantage of a condition broken.^f

II. Election considered in application to covenants.

It does not fall within the compass of the present observations, to make any detailed inquiry upon this head; nor indeed does the subject itself call for it; and but few points present themselves for notice.

^c Co. Lit. 215b.

^d Co. Lit. 214 b. 215 a. 3 Co. Rep. 65a. 8 Co. Rep. 95b. 10 Co. Rep. 48b. Shep. To. 151. [7th ed.]

^e Co. Lit. 214 b.

^f Shep. To. 148. [7th ed.]

If two persons covenant for themselves jointly and severally, the covenant may be joint or several, and the covenantors be sued either one way or the other at the election of the covenantee.^s

And words may operate either by way of condition or of covenant; as if a lessee for years covenants that if he, his executors or assigns alien, it shall be lawful for the lessor to re-enter; this is a good condition, and not a covenant only, and the lessor may take it either as a covenant or condition, but not as both.^h

Where upon a lease being granted, the lessee covenants for the performance of any act, he does not, by assigning over the property leased, discharge himself from liability under the covenant, but the lessor or grantee of the reversion may at his election charge either the lessee or assignee, in such cases wherein the latter is bound: therefore if a lessee covenants for himself and his assigns to repair, and afterwards makes an assignment, the lessor may have his action either against the lessee or assigneeⁱ: and if a lessee covenants for himself his executors administrators and assigns to repair, and the reversioner grants away his reversion, and the lessee assigns his estate; though the grantee of the reversion have accepted rent of the assignee of the term, yet he may still have an action of covenant against the lessee upon his covenant, and his representatives after his death.^j

So if a patentee covenants for himself and his assigns to repair, and afterwards assigns; the king may have his action either against the patentee or assignee.^k

And upon all covenants in fact which bind the assignee, the lessor or covenantee has his election either to charge the assignee or the covenantor himself, even though he has accepted rent from the assignee. But upon a covenant in law, no action lies against the

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^s Shep. To. 166. 180. [7th ed.]

ⁱ Bro. Ab. tit. Covenant, pl. 32.

^h Shep. To. 124. and n. (15.)
ibid. [7th ed.]

^j Shep. To. 180. [7th ed.]

^k Ibid.

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assignor, after an assignment and acceptance of rent from the assignee.¹

Thus where in action brought upon an express covenant against a lessee for not repairing in pursuance of a notice given him by the lessor, he pleaded that before the notice he had assigned over his term, and that the assignee had afterwards paid his rent to the plaintiff; upon demurrer it was held that the assignment did not take from the lessor his advantage of the express covenant, notwithstanding his acceptance of rent from the assignee, but that he might charge the lessee or assignee at his election.²³

**Election to
charge les-
see, execu-
tor, or
assignee.**

Where assignee cannot be charged.

And if a man covenants to pay rent, and afterwards assigns, the lessor may charge the party, or his executors, or the assignee at his election; and so it is if there be twenty assignments, for the party and his executors are always liable upon the deed to the covenant. But if an assignee assigns over, and the second assignee breaks the covenant, the first assignee cannot be charged, but the second assignee who broke the covenant or the lessee or his executors may.ⁿ

Waiver of forfeiture by breach of covenant.

Lastly it may be noticed, that where in a lease for years there was contained a general covenant on the part of the lessees to repair, and also a covenant to make such reparations within three calendar months after notice in writing from the lessor, as should be required by such notice; and the lessor was empowered to re-enter on the non-performance of any of the covenants contained in the lease; and after having given notice to the lessees to do certain repairs, the lessor proceeded against them in ejectment previously to the expiration of the three months, with the view of recovering possession of the premises for a breach of the general covenant to repair: the notice was held to operate as a waiver of the forfeiture incurred by a breach of that covenant. °

¹ Shep. To. 180. n. (53.) [7th ed.]
 Barnard v. Godscall, Cro. Jac. 509.
 522. Cro. Car. 188. 580. 1 Rol.
 Ab. 522. Bacheloure v. Gage, W.
 Jo. 223. 1 Sid. 447. 1 Fon. Eq. 562.
 and n. (a).
 • Barnard v. Godscall, *supra*.
 • *Bear 1 Freem. 337, 338.*
 • *Doe v. Meux, 4 Bar & Cr. 606.*

CHAP. II.

ELECTION CONSIDERED IN APPLICATION TO SUCH DISPOSITIONS OF PROPERTY AS ARE VOIDABLE BY REASON OF A DISABILITY OF PERSON.

SECTION I.

Election considered in application to the dispositions of Infants.

Accts done by infants affecting their real estates^a may be considered as falling under a threefold division, namely, 1. such as are binding and conclusive; 2. such as are voidable; and 3. such as are void^b: — under the first may be classed those acts, which they are compellable by any mean or in any way to do; and those which do not touch their interest, but take effect from an authority which they are trusted to exercise^c: under the second may be classed all such gifts grants or deeds by matter in deed or in writing, which take effect by delivery of their hands: — and under the third, all such gifts grants or deeds which do not take effect by delivery of their hands: but these several divisions are each susceptible of further enlargement. The more immediate object however of the ensuing inquiry is, to take a view of such dispositions made by infants as are voidable only, and therefore the subject of election: but in order to ascertain what dispositions partake of this character, it will be adviseable to consider as well those which are valid, as those which are void. It is proposed therefore

^a Though the present inquiry has principally reference to the acts of infants touching their real estates, yet their personal con-

tracts are incidentally touched upon.

^b See 2 Eden's Rep. 72.

^c 3 Burr. 1801, 1802, in Zouch v. Parsons.

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to pursue the inquiries upon the present subject under the following heads :—

I. What dispositions made by infants affecting their real estates, are binding upon them and those claiming under them, and incapable of being afterwards avoided.

II. What dispositions are voidable only, and capable of being afterwards either avoided or affirmed at the election of the infants, and those claiming under them.

III. What dispositions are void, and incapable of being afterwards affirmed.

IV. By whom an election to avoid the voidable dispositions of infants, may and may not be exercised.

V. The commission of what acts by adults will be considered as demonstrative of an election to affirm their voidable dispositions made under the disability of infancy.

What dis-
positions
are bind-
ing.

I. What dispositions made by infants affecting their real estates, are binding upon them and those claiming under them, and incapable of being afterwards avoided.

The reason assigned for the privilege enjoyed by infants in making many of their acts inconclusive is, for the purpose of protecting them from wrong^a: — generally therefore, whatever an infant is bound to do by law, the same shall bind him, though he do it without suit at law.^c

Partition.

As if a partition be made by agreement, wherein an infant is concerned, if such partition be equal at the time of the allotment, it will bind the infant for ever, because he is compellable by law to make partition.^f

**Payment of
rent, adminis-
tion of
copyholder.**

And if an infant pays rent, or admits a copyholder, those being acts which he was compellable to do, shall bind him.^g

**Attorn-
ment.**

And the attornment of an infant to a grant by deed, was by the common law good and binding upon him, because it was a lawful act, though he was not upon that grant compellable to attorn.^h

^a 3 Burr. 1801, in Zouch v. Parsons. But this mode of effecting a partition is now obsolete.

^b Co. Lit. 172a.

^c Co. Lit. 171 a; and a partition made by the king's writ is binding upon an infant: Co. Lit. 171 a, b.

^d 3 Burr. 1801. And an assignment of dower by an infant is good. Park Dow. 268.

^e Co. Lit. 315 a.

So the reconveyance of an infant mortgagee is binding upon him, and cannot be avoided by entry during his infancy.

This was decided by the well known case of *Zouch v. Parsons*¹, in which all the authorities respecting the abilities and disabilities of infants were fully gone into and considered: and since the decisions which the Court came to upon that case are of the utmost importance, it may be proper to give a short statement of it. The case was as follows: —

A. in 1751, conveyed certain hereditaments in mortgage to B. in fee, for securing the repayment of 280*l.* B. afterwards died, leaving C. an infant, his eldest son and heir, and together with his mother D. an executor and residuary legatee under his will. A transfer of this mortgage was afterwards executed to the lessors of the plaintiff by deeds of lease and release, to the latter of which C. the infant, and D. his mother, were parties of the first part, A. of the second part, and the lessors of the plaintiff of the third part. At the time of the execution of this deed, 100*l.* principal money, and 9*l.* for interest, remained due upon the mortgage to B., he having received the other 180*l.* in his lifetime, which 109*l.* were paid to D. out of 400*l.*, the sum advanced by the lessors of the plaintiff, the residue thereof being paid to A. — A. continued in possession of the mortgaged premises until the year 1756, when he conveyed them by way of mortgage to E. for a term of years, who in 1762 assigned the said term to the defendant, he having before such assignment received notice of the mortgage to B., and of the transfer of it to the lessors of the plaintiff. Two days before the assizes C. made an entry on the premises, in order to avoid the lease and release to the lessors of the plaintiff.

On an ejectment brought by the lessors of the plaintiff against the defendant, a verdict had been found for the plaintiff, subject to the opinion of the Court upon the

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Reconvey-
ance by
infant mort-
gagee.

¹ 3 Burr. 1794, et seq.

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above case, wherein the question was, whether an infant's conveyance by lease and release was absolutely void or only voidable.

And Lord Mansfield C. J., after noticing that the merits of the case turned upon the two general questions, 1. whether the conveyance was good and bound the infant; 2. if it did not bind the infant, whether the defendant could take advantage of the infancy, and on that account object to it, pronounced the judgment of the Court in answer to the first question to be, that the conveyance bound the infant; and as to the second question, which he said depended upon two points, 1. whether the conveyance was void or only voidable, 2. if voidable only, whether the infant before the assizes had absolutely avoided it, he pronounced the judgment in answer to the first point to be, that the conveyance was voidable only; and in answer to the second point, he observed it to be immaterial whether the entry was of any use.

And in the course of his judgment upon the first general question of the case he observed, that the fee which descended to C. the son, was merely as a pledge for the money:—that besides the money, the infant had no beneficial interest whatever, and upon payment was bound to convey as the mortgagor should direct: — that an adult under the same circumstances would have been guilty of a breach of trust if he had refused; that he would have been compelled to convey, and been condemned in costs for refusing: — that the infant's conveyance was matter of form, and in the nature of an authority executed by A.'s direction: — and that he was compellable by act of parliament^j to do what he had done.^k

And in a more recent case, wherein the foregoing decision was recognised and approved of, it has been laid down, that although an infant conveying as a trustee under

^j 7 Ann, c. 19.

^k This case it may be observed, so far as it affected generally to treat the lease and release of an infant as voidable only, and not

void, seems not to have met with the universal approbation of the profession. See 2 Pr. Conv. 249. 1 Pr. Abs. 524, 525.

the statute of 7. Ann. c. 19.¹, but not being so, will not be bound by his conveyance; yet if it is a case in which he would be bound to convey when of age, his conveyance being voidable only during his infancy, and until avoided passing the legal estate, and no one having a right to elect for him whether it should be void or not; he will, when he becomes adult, be placed in such a situation, that if he seeks at law to avoid his deed, a court of equity will prevent him.²

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If an infant by his guardians suffers a common recovery, he being tenant to the præcipe, this shall bind him so that he shall not avoid it in a writ of error, for by intendment he shall have recompence in value; and if this be not for the good of the infant, he may have his recompence over against his guardians.³

Recovery
by
guardian.

Thus where an infant tenant in tail suffered a recovery by his guardian, the Court held that the same should bind him, because he might have remedy over against the guardian by action upon the case; but that it was otherwise if he suffered a recovery by attorney, which was void, because he had not any remedy over against him.⁴

It has indeed been said, that a common recovery suffered by an infant, although he appears by guardian, shall not bind the infant.⁵ But this was denied to be law in *Newport and Mildmay*⁶; and upon a recovery so suffered, no writ of error was held to lie.

When the practice prevailed for infants to suffer recoveries by their guardians, and upon privy seals obtained for that purpose, the same were conclusive upon them, and could not be reversed on a writ of error brought, and infancy assigned for error.⁷ — But this practice is now be-

And upon
privy seal.

¹ This statute is now repealed by that of 6. G. 4. c. 74., and its enactments more fully re-enacted.

² ——— v. Handcock, 17 Ves. 583.

³ Newport & Duke of Buckingham, 1 Rol. Ab. 731.; and see W. Jo. 318. 1 Leon. 211.

⁴ Zouch and Michil's ca. Godb. 161. pl. 225.

⁵ 10 Co. Rep. 43 a.; and see Bridg. 75. in arg. Palm. 225, 226. 2 Rol. Ab. 395. 575. Sty. 246.

⁶ Cro. Car. 307.; and see 1 Rol. Ab. 731. 751, 752. 1 Sid. 321, 322.

⁷ Newport v. Mildmay, supra. Blount's ca. Hob. 196. W. Jo. 318.

⁸ Saun. 94. 1 Mod. 48. Heli. 171, 172. Ley, 82, 85.

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As to the dispositions of infants.

Letter of attorney to receive livery.

Acts warranted by custom.

Feoffment of gavel-kind lands.

Voluntary grants by copy.

Copyhold surrenders.

Devise.

come obsolete, private acts of parliament being found more suitable for the accomplishment of the desired objects.^a

If a man makes a feoffment to an infant, who makes a letter of attorney to another to receive livery for him; this it seems is good, because for the infant's benefit, though said to have been doubted.^b

Also acts done by infants which are warranted by the custom prevailing in particular places, will be conclusive upon them; as in the county of Kent in respect to gavel-kind lands, which by feoffment are capable of being aliened by infants on attaining fifteen years.^c And we find it said in Moor, that if by force of this custom an infant makes a feoffment to such uses as he shall appoint by his will, if he executes a will, though the same is void as his last will, he being an infant, yet it shall serve to declare the uses of the feoffment.^d But Lord Hardwicke has said, that he took this case not to be law; that it was put only arguendo at the bar, no case being cited for it, and that he could find no authority to support it.^e

An infant is also said to be capable of making voluntary grants by copy.^f

And where the custom of some copyhold manors authorizes surrenders made by infants at various ages of their copyhold lands, such surrenders will be good^g; the custom being *lex loci*, and as strong for this purpose as if an act of parliament had been made.^h

A case is reported where the surrender of a copyhold estate by an infant of five years of age was allowed, though the lord of the manor insisted he never heard of any admittance in the manor at such an age.ⁱ

And if there be a custom that all lands and tenements within such a precinct are devisable by all persons of the

^a Co. Lit. 280b. n. (1). [17th ed.] Greenbank. 1 Ves. sen. 205. in
Cru. Recov. 184.

^b Bro. Ab. tit. Coverture, pl. 25. ^x Co. Cop. 34. 1 Watk. Cop. 24.
tit. Faits, pl. 51. 1 Rol. Ab. 750. ^y 4 Co. Rep. 25b. 1 Scriv. Cop.

^c Rob. Gav. 248.

148. [2d ed.]

^d Mo. 512.

^z 3 Atk. 711.

^e See 3 Atk. 711. in Hearle v.

^u Nayler v. Strode, 2 Ch. Rep.

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age of fifteen or upwards, a devise made of lands or tenements by one of such age is good.^b

Infants may also execute conveyances in performance of conditions.^c

And such conveyances made by infants as are sanctioned by the statute of 6. G. 4. c. 74., will of course be incapable of being afterwards avoided.

So likewise surrenders made by infants of leases in a court of equity in order to renew the same, under the provisions of 29. G. 2. c. 31., will be binding upon them. And the court will of its own authority decree building leases of infants' estates when for their benefit.^d

An infant may also devise the guardianship of his child by virtue of the statute of 12. C. 2. c. 24. s. 8. But whether such a disposition draws after it the land as incident to the guardianship, seems a point undetermined.^e

And if an infant presents to a benefice, the presentation will stand good, and not be stayed for his non-age; since a presentation is not a thing of profit of which the guardian can make any benefit^f: but the strong ground the law goes upon is, because there can be no inconvenience, as the bishop is to judge of the qualification of the clerk presented.^g

Upon this subject it has been observed^h, that though the decision of Lord King in the case of *Arthington and Coverley*ⁱ, may have removed all doubts about the legal right of an infant of the most tender age to present; still it remains to be seen, whether the want of discretion would induce a court of equity to control the exercise, where a presentation is obtained from an infant without the concurrence of the guardian.

And the mayor, bailiff, or head of any other corporation, shall not avoid any of their deeds or grants by reason of

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ances in
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ditions.

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ship.

Presenta-
tion to be-
nefice.

Deeds of
infant
mayor, &c.

^b Perk. s. 504.

^f 3 Leon. 46. in pl. 66. per Man-
wood J. Co. Lit. 89a.

^c Co. Rep. 44 b. in Whitting-
ham's ca. 3 Atk. 710. 1 Rol. Ab.

^g 3 Atk. 710.

421. 1 Pr. Ab. 319.

^h See Co. Lit. 89a. n. (1). [17th
ed.]

^d See 2 Vern. 225.

ⁱ 2 Eq. Ca. Ab. 518. pl. 3.

^e Bedell v. Constable, Vaugh. 177.

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Acts taking effect from authority.

As the attorney of another.

Acts of infant executor.

Execution of powers simply collateral.

Of powers appendant and in gross.

the infancy of their natural capacity, because they do them in another right and capacity.^j

Also acts done by an infant which do not touch his interest, but take effect from an authority which he is intrusted to exercise, are binding.^k

Therefore acts done by him as the attorney of another will be valid.^l

And it has been laid down, that if an infant were executor, all things which he did according to the office and duty of an executor should bind him; therefore that if he made a release as an executor, the same was good, and he could not avoid it.^m And that if an infant administrator above seventeen years of age, with the assent of his friends sold a lease for years which he took as administrator, for the purpose of paying the testator's debts, this would bind him.ⁿ The statute of 38. G. s. c. 87., has however in part superseded further inquiries upon this point, by incapacitating infants from performing the duties of executors until they have attained their full age of twenty-one years, directing administration with the will annexed to be granted during the minority of such infants either to their guardians, or such other persons as the spiritual court should direct.

Such powers executed by an infant as are simply collateral, and where he is a mere instrument or conduit pipe, and his interest is not concerned, are good and binding.^o

But as to powers appendant and in gross over real estates, the better opinion seems to be that they cannot be exercised by infants, even if the disability of infancy be expressly dispensed with: for though a case is reported to have been decided, which seems to favor the position of such powers being exerciseable by infants, as where an infant, tenant for life, with a power to jointure upon his marriage, covenanted together with his mother to settle lands on his wife, and afterwards died without having

^j 5 Co. Rep. 27a, b. arg.

^k 3 Burr. 1802.

^l 1 Pr. Abs. 525.

^m 5 Co. Rep. 27b.; but see Mo.

146. pl. 289.

ⁿ 1 Rol. Ab. 730.

^o 3 Atk. 710. Sug. Pow. 159.

made any jointure, and equity made good the jointure^p; yet Lord Alvanley when at the Rolls in citing this case said, he could not but believe the infant must have done some act after he came of age to confirm the jointure.^q And Lord Hardwicke in *Hearle v. Greenbank*^r observed, it had never yet been held that an infant could exercise any power coupled with an interest over real estate.

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It has indeed been suggested of the cited case of *Hollinshead v. Hollinshead*^s, that it was perhaps held binding from the nature of the power, which being to settle lands in jointure, implied the right of executing it during infancy; for as the infant might contract marriage during infancy, to which dower was incidental, if he had not been allowed to execute his power, by making the jointure in lieu of dower previous to the marriage, the power afterwards might have been a mere nullity.^t

And an infant may dispose of personal property by will before twenty-one, though it be a controverted point at what age this power begins to attach.^u And at that age at which by law he may dispose of personality to which he is absolutely entitled, he may exercise a power over the same.^v

Disposi-
tions of per-
sonality.

How far it is competent to infants to bind their real estates by agreement, has been made matter of some doubt: for though Lord Macclesfield held, that if a feme infant seized in fee, on a marriage with the consent of her guardians should covenant, in consideration of a settlement, to convey her inheritance to her husband, equity would execute the agreement if in consideration of a competent settlement^w; yet Lord Hardwicke observed^x this was going a great way,

Disposi-
tions affect-
ing real
estate not
binding.

^p *Hollinshead v. Hollinshead*, cited 2 P. Wms. 229.; and see Sug. Pow. 160, 161. But see 1 Pr. Abs. 326.

^q Co. Lit. 69 b. n. (6). 171 b. n. (6). [17th ed.]

^r *Hearle v. Greenbank*, 3 Atk. 695. Sug. Pow. 161, 162.

^s See 4 Bro. C. C. 466.
^t 3 Atk. 713.; and see Sug. Pow. 160.

^u 2 P. Wms. 244. in *Cannel v. Buckle*.

^v See 5 Atk. 615. in *Harvey v. Ashley*; and see *Strickland v. Coker*, 2 Ch. Ca. 211. cited 3 Atk. 614.

^u *Supra*.

^v See 1 Fon. Eq. 85. in n. (c).

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as it related to the inheritance of the wife; but that there were cases where the Court would do it, as if the lands of the wife were no more than an adequate consideration for the settlement that the husband made, and after the marriage the wife should die, and leave issue, who would be entitled to portions provided for them by the settlement; that it would in such case be very reasonable to affirm the settlement. And he further observed, that the reason why it might be necessary to apply for an act of parliament upon the marriage of an infant who had an interest in real estate was, that the rights of the infant to real estate would not be bound by any agreement made in relation to it, unless the husband should have issue by that marriage.

But upon the cases of *Cannel v. Buckle* and *Harvey v. Ashley* it has been observed, that in neither of them was the point decided, though something like the principle was laid down; and it has been thought hardly probable that Lord Hardwicke laid it down so broadly, and that it is impossible to apply the principle more strongly as to a female than a male infant.¹

And though in *Durnford v. Lane*², where the husband was an adult and the wife an infant, Lord Thurlow held the husband bound by his own covenant, yet he left the question open how far it bound the wife.

So where by settlement previous to the marriage of an adult female with an infant male, she covenanted with the trustees that her real and personal property should be settled in a certain specified manner, he was held bound by such covenant.³

It seems however to be now settled, that an infant cannot be bound by any article entered into during minority as to her real estate, but may refuse to be bound, and abide by the interest which the law casts upon her, which nothing but her own act after the period of majority can fetter or affect. And this applies as well to male as female infants.

¹ See 4 Bro. C. C. 509.
² 1 Bro. C. C. 106.

³ *Slocombe v. Glubb*, 2 Bro. C. C. 545.

The above principle was laid down by Lord Thurlow in *Clough v. Clough*^b; in which case a bill was brought on behalf of children against their mother, to carry into effect articles made before marriage touching the mother's estate, at which period the mother was an infant, and to which articles her guardians were made parties: and the decree declared, that her estate was not bound by the articles, and the bill was dismissed.

But with respect to the ability of infants to bind themselves by settlements made on their marriage, though there be no decision that a male infant may settle his real estate^c, yet it has been decided that an infant female may bar herself of dower by consenting to a jointure in lieu thereof by virtue of the statute of 27. H. 8.: and she may also by contract made previous to marriage, bar herself of a distributive share of her husband's personality, in the event of his dying intestate.^d

But if the jointure may not certainly take effect in possession at the death of the husband, which renders it void at law, equity will not make it good: and though the father or guardian be made a party to the instrument whereby such provision is created, yet the same will not be binding upon the infant.

For where previously to the marriage of an infant, an estate had been limited with the consent of her father, who was a party to the conveyance, to the husband's mother for life, remainder to the husband for life, remainder to the wife for life, if she should survive the mother and husband, as part of her jointure, and in bar of dower; and the husband's uncle made a surrender of copyhold property, which was recited to be for making some further provision for the marriage, and was to the use of himself for life, re-

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Infant feme
may accept
of jointure
in bar of
dower;

and of dis-
tributive
share in
husband's
personality.

By what
jointure she
will not be
bound.

^b Cited 4 Bro. C. C. 510. in ^c 4 Bro. C. C. 509. 1 Fon. Eq. Caruthers v. Caruthers; and see 74. in n. 5 Woodes. 453. n. 5 Ves. 717. in ^d Earl of Buckingham v. Drury, Clough v. Clough, and n. (a); and ⁵ Bro. P. C. [ed. Toml.] 570. 18 Ves. 275, 276. in Milner v. Lord ² Eden's Rep. 60. Drury v. Drury, Harewood. ^{ibid.} 39.; and see Williams v. Chitty, 3 Ves. 545.

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remainder to the husband for life, remainder to the wife for life: on the question whether the wife was not bound to take these provisions in bar of her dower, she was declared not to be so, for that if the settlement was good at all, it must be so from the making thereof; but that she could not be bound then, for non constat at the time of the marriage that either of the estates would be her's in possession on the death of the husband. And she was declared to be at liberty to make her election, and take the provisions made for her, or her dower;^e deciding therefore in effect, that the assent of the father could not bind an infant to accept a jointure which wanted one of the essential qualities required by the statute.^f

By what
 equitable
 jointure she
 will be
 bound.

An infant feme will however be bound by an equitable jointure made with the consent of her parent or guardian, where in a parallel case she would have been bound had the jointure been legal, as will appear from the following case of very recent adjudication.^g

Previously to the marriage of the plaintiff, an infant feme, the intended husband, by settlement to which the plaintiff and her father were made parties, granted to trustees, in exercise of a power in that behalf, a yearly rent-charge of 100*l.* for the natural life of the plaintiff, in case she survived him, to be issuing out of estates whereof he was seized as tenant for life in possession, (with remainder to his first and other sons in tail, remainders over, with power to grant to the use of any wife he should marry, as a jointure, such part of the estates as he should think fit, so as such jointure exceeded not 10*l.* yearly for every 100*l.* he should receive as a fortune with such wife;) and it was agreed, that the rent-charge and other provisions thereby made for the plaintiff, should be in full for her jointure, and in bar of dower. Some time after the mar-

^e Caruthers v. Caruthers, 4 Bro. C.C. 499.; and see Smith v. Smith, 5 Ves. 189.

^f Per Leach V.C. in next cited case. The foregoing case, though in strictness falling under the next

division, is introduced here in consequence of its immediate connection with the subject under discussion.

^g Corbet v. Corbet, 1 Sim. & Stu. 612.

riage, it was discovered that the plaintiff having had no fortune, the rent-charge could not be granted under the power, and in consequence thereof the husband applied to the next tenant in tail in remainder expectant on his death without issue, to confirm the rent-charge, which he agreed to do, and thereupon a recovery was suffered, the uses of which, by an indenture whereto the plaintiff was named as a party, were declared to secure the rent-charge. There was issue of the marriage an only daughter, and soon after the husband's death, (who was also seized of other estates in fee, which he devised to various persons), the plaintiff brought her bill, claiming dower out of the estates of which her husband was seized, and waving thereby the jointure of 100*l.* a year; and on the question whether she was barred of her dower by the rent-charge of 100*l.*, she was decreed to be so: and his Honor the Vice Chancellor in the course of his judgment observed, that the jointure was equitable, and not legal, being given to trustees for the benefit of the wife, and not directly to the wife herself: that in order to try the application of Caruthers v. Caruthers,^b it might be assumed that the professed jointure was legal, and given directly to the wife herself; and then it was to be asked, whether that being a legal jointure, the plaintiff could under the circumstances renounce it, and claim her dower: that the 7th section of the statute of H. 8. expressly provided that a wife evicted of her jointure, should be remitted to her dower only pro tanto; therefore, that if in the case before him the jointure had been a legal one, and the settlement had failed as to the particular lands by the defect of title in the husband, the widow could only have claimed dower to the extent of 100*l.* a year: and consequently when the settlement did not fail by reason of subsequent confirmation, if the jointure was legal she must be bound by it: and that the only question then being, whether the assent of the father should remove the

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^b Supra.

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Leasehold
 estate and
 personalty
 of infant
 feme, may
 be bound
 on mar-
 riage.

So may the
 personality
 of male
 infant.
 Infant may
 bind him-
 self for ne-
 cessaries,
 &c.

objection which arose under the statute from the mere equitable quality of the jointure, all the authorities concurred that the assent of the father or guardian should have that effect.

And the leasehold estate of an infant feme may be bound by settlement upon marriage; so likewise may her personal estate, as well consisting of things in action, as property in possession, and whether of a vested or contingent nature.¹

For where, upon the marriage of an infant, certain leasehold estates for years belonging to her were covenanted to be settled by articles of agreement, to which she and her father were made parties, the estates were held to be bound by the uses of the articles, his Honor the Vice Chancellor observing, that as to the personal estate, they were the articles of the husband, and not of the wife, and that there was no difference between the personal estate absolutely vested in possession in the husband, and choses in action and chattels real which might survive to the wife.^j

The personal estate of a male infant is also capable of being bound by settlement on marriage.^k

We find it laid down by Lord Coke, that an infant may bind himself for his necessary meat, drink, apparel, physic, and such other necessaries, and likewise for his good teaching and instruction whereby he may profit himself afterwards: but that if he bind himself in an obligation or other writing with a penalty for the payment of any of these, the obligation shall not bind him.^l Yet it seems that if an obligation be taken from an infant in [a penalty for] the very sum which has been laid out for his necessary maintenance, it will be good.^m And though an infant is under a disability of contracting debts, except for necessities, yet this is a relative term, and must be understood

ⁱ See Harvey v. Ashley, 3 Atk. 607. Pyke v. Pyke, 1 Ves. sen. 376. Williams v. Williams, 1 Bro. C.C. 152.

^j Trollope v. Linton, 1 Sim. & Stu. 477.

^k See 9 Ves. 19. in Ainslie v. Medlycott.

^l Co. Lit. 172 a. Mo. 679. pl. 929.

^m See Ayliff v. Archdale, Cro. El. 920.

to mean necessaries according to the infant's degree and station in life.ⁿ And for those things which a Court can pronounce to be necessary for an infant, he may bind himself even by deed.^o

It may be proper to add, that if an infant enters into a contract with the advice and concurrence of his friends, and such contract appears to be beneficial to the interests of the infant, equity will support and give it effect; for otherwise the rule of law, which restrains the contracting of infants, might operate the most fatal and irreparable prejudice to the very interests it is intended to protect.^p

Therefore where A. mortgaged his estate to the plaintiff, and died, leaving the defendant his daughter and heir, who was an infant, and had nothing to subsist upon but the rents of the mortgaged estate; and the interest being suffered to run in arrear three years and a half, the plaintiff threatened to enter on the estate unless his interest was made principal; upon which the defendant's mother, with the privity of her nearest relations, stated the account, and the defendant herself, who was then near of age, signed it: the account being admitted to be fair, it was held, that though regularly interest should not carry interest, yet in some cases, and upon some circumstances, it would be injustice if interest were not made principal,

ⁿ See accord. 2 Atk. 55, in *Hobart v. Gally*. *Hands v. Slaney*, 2 T.R. 578.

^o See accord. 2 H. Bl. 514. in *Keane v. Boycott*. Though an infant cannot bind himself by a bill of exchange; Carth. 160.; yet it is to be inferred from the case of *Trueman v. Hurst*, 1 T.R. 40., that a promissory note given by an infant for necessaries and for instruction in business, is binding upon him. And it appears from the authorities, that an indenture of apprenticeship entered into by an infant, is voidable at his election on coming of age; ex parte *Davis*, 5 T.R. 715. Upon the point,

whether it is voidable by him during minority, Lord Kenyon has said, he desired it might not be taken for granted that an infant, who bound himself apprentice, a contract so notoriously for his own benefit, might put an end to that contract at any time during his minority; see 6 T.R. 558. But an infant apprentice may, with the concurrence of the master, put an end to the indenture of apprenticeship during minority, when such a measure is obviously for the benefit of both parties; *Rex v. Mountsorrel (inhabitants)*, 4 M. & S. 497.

^p See 1 Fon. Eq. 77. in n.(a).

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Contract,
when sup-
ported.

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and the rather in that case, because it was for the infant's benefit, who without that agreement would have been destitute of subsistence.⁴

And where there was a submission to an award by A. on the one part, and the defendant an infant and his guardian on the other part, and the award was to the effect that during A.'s life, and the infant's minority, the plaintiff and defendant should be at liberty promiscuously to dig lead ore, and that the profits should be divided equally between them; on a bill brought to confirm the award, the Court being of opinion that the infant was bound by it, decreed accordingly.⁵

**Infant
bound, if
conusant of
fraud.**

But an infant shall not convert his privilege, which is given him as a shield, and not as a sword, into an offensive weapon of fraud or injustice.⁶ If therefore an infant is conusant of fraud, he shall be as much bound as an adult.⁷

As if tenant for life being of full age, and he in remainder being within age, join in a fine to a stranger, and the infant reverseth the fine for nonage, yet he shall not enter for forfeiture, because he joined in the fine, and consented to it.⁸

In *Saunderson v. Marr*⁹, the above rule was confined to such acts as are only voidable; and therefore a warrant of attorney given by an infant being absolutely void, the Court could not confirm it, though the infant appeared to have given it, knowing that it was not valid, and for the purpose of collusion.

**So if con-
susant of his
right.**

And if an infant is conusant of his right, it seems he may under certain circumstances be bound: for we find mention made by Lord Hardwicke of a case¹⁰, where an infant nineteen years of age was an issue in tail, and

⁴ Earl of Chesterfield and Lady Cresswell, 9 Vin. Ab. 415. 2 Mad. Cromwell, 1 Eq. Ca. Ab. 287. pl. 1. 50. in *Cory v. Gertcken*.

⁵ Bishop of Bath and Wells v. Piggot and Russel's ca. 2 Leon. Hippesley, 28 C. 2. cited 3 Atk. 108. Cro. El. 124. 614. 1 H. Bl. 75.

⁶ 3 Burr. 1802. ⁷ *Clere v. Earl of Bedford*, See 1 Fon. Eq. 77. in n. (2). 13 Vin. Ab. 536. pl. 1. cited 9 Mod. 2 Eden's Rep. 71. 73. Watts v. 36. 2 Vern. 151.

engrossed a mortgage deed of the entailed estate; and the Court held that such act would exclude him, and would not suffer him to dispute it by reason of concealing his right.^x

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So if an infant having a right to an estate, permits or encourages a purchaser to buy it of another; the purchaser will be entitled to hold against the person who has the right, although under age.^y

II. What dispositions of infants affecting their real estates are voidable only, and capable of being afterwards either avoided or affirmed at the election of the infants and those claiming under them.

*What dis-
positions
are void-
able.*

The common principle is said to be, that an infant in all things which sound to his benefit shall have favor and preferment in law as well as another man, but shall not be prejudiced by any thing to his disadvantage^z: and the end of the privilege in making the deeds of infants voidable, is for their protection; to that object therefore all the rules and their exceptions must be directed.^a

The law laid down by Perkins as applicable to the voidable dispositions of infants is, that all gifts grants or deeds made by infants by matter in deed or in writing, which take effect by delivery of their hands, are voidable by themselves and their heirs, and by those who have their estate.^b And this definition was approved of and adopted in the case of *Zouch v. Parsons*^c, the Court observing that the words, "which do take effect," were an essential part of it, and excluded letters of attorney, or deeds which delegated a mere power and conveyed no interest.

In accordance therefore with the above principles, if Fine, an infant levies a fine, the same is voidable during his minority; for though the acknowledgment thereof ought not to be admitted under that disability, yet his agreement being once recorded as the judgment of the Court, it shall

^x See 2 Ves. sen. 212. 2 Eden's Rep. 71, 72, 73, and n. (a). there. ^y Sug. V. & P. 624. [5th ed.] ^z Dy. 136, 137. in pl. (22). ^a 3 Burr. 1808. ^b Perk. s. 12. ^c 3 Burr. 1804.

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for ever bind him and his representatives, unless he reverses it by writ of error, which must be brought by him during his minority, that the Court by inspection may determine his age.^d

**Recovery
in person.**

And though an infant is bound by a common recovery suffered by his guardians^e, yet if he suffers a common recovery in person, the same is voidable, and may be reversed by writ of error brought during his minority.^f

**Deed de-
claratory of
uses.**

And a deed executed by an infant, declaratory of the uses of a fine levied or recovery suffered by him, will stand good until such fine or recovery be avoided, for being enabled to effectuate the principal, he therefore shall not be disabled from effectuating the accessory.^g And if an infant covenants by indenture to levy a fine, and that it shall enure to certain uses; and afterwards levies the fine, and dies within age; the limitation of uses shall bind the heir of the infant as well as the infant himself, so long as the fine continues unreversed.^h

**Interposi-
tion of
equity.**

It appears however that a court of equity will in some cases interpose its authority, where a conveyance has been obtained from an infant, and ingraft upon it a trust in his favor.ⁱ

**Recog-
nizance,
etc.**

And if an infant acknowledges a recognizance or statute, the same is voidable only, and may be reversed by audit^j querelâ during his minority.^j

**Feoffment
and livery
in person.**

And if an infant of whatever age executes a feoffment, and makes livery by himself and not by attorney, it is voidable only, and not void.^k But if he makes a letter of attorney to one to make livery, who does it, the same is

^d Co. Lit. 380 b. 2 Rol. Ab. 15.
 2 Inst. 483. 2 Bulst. 320. 12 Co. Rep. 122 b. Willes, 161. Cru. Fines, 121. Perk. s. 19.

* See supra, page 43.

^e 1 Rol. Ab. 731. 742. 2 Ibid. 395. Co. Lit. 380 b. 10 Co. Rep. 43 a. Sid. 321, 322. 1 Lev. 142. Noy, 140. Sty. 246. in Ailet v. Watless. Cro. El. 323.

^f 5 Atk. 710, 711. 2 Co. Rep. 58 a. 10 Ibid. 42 b.

^h 1 Rol. Ab. 730. cites Spring v. Sir Julius Cæsar. W. Jo. 389. pl. 10. Cooper v. Edgar, Win. 103, 104.

ⁱ 5 Cru. Dig. 302. 1 Pr. Abs. 325.

^j Mo. 75. pl. 206. 2 Inst. 483. 673. Co. Lit. 380 b. Keil. 10. 10 Co. Rep. 43 a. Yelv. 155. 3 Mod. 229.

^k Bro. Ab. tit. Feoffements de Terres, pl. 48. 4 Co. Rep. 125 a. 8 Ibid. 42 b. 2 Rol. Ab. 2.

void, and trespass lies¹, and he shall be taken for a dis-
seisor.²

And an infant having made a feoffment, may enter either
within age, or at any time after his full age; and if he dies,
his heir may enter. And if he makes a feoffment, or con-
veys by lease and release, and re-enters within age, still the
feoffment or conveyance is only voidable; and he may elect
to confirm it when of full age.³

Though the feoffment of an infant, tenant for life or
years, is not such a forfeiture but that if the lessor enters,
the infant may enter upon him again, it being a defeasible
forfeiture; yet if it be by matter of record, as if the infant
be lessee for life, and levies a fine, it is a forfeiture, and if
the lessor enters for the forfeiture, the infant shall not enter
again.⁴

And an exchange made of lands by an infant is not
void, but voidable only, because it amounts to a livery,
and also in respect of the recompence.⁵

And no difference is said to exist between a feoffment,
and deeds which convey an interest, in regard to their
voidable quality.⁶

Thus it is said, that though by some the grant of an infant is void and not voidable, yet it is not so, for then an action of dum fuit, &c. would not lie for rent reserved on the deed of an infant, and therefore the delivery of the deed could not be void but voidable.⁷

We also find it laid down, that if an infant before the age of twenty-one make any deed or feoffment grant release confirmation obligation or other writing, all serve for nothing and may be avoided⁸: and that an infant's deed is not void, but voidable only, for which reason an infant

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Forfeiture
by infant
when de-
fearable.

Exchange
voidable.

Release,
confirma-
tion, &c.

¹ Bro. Ab. tit. Coverture, pl. 26.
— Perk. s. 13. 2 Rol. Rep. 242.

arg. Palm. 237.

² Lit. s. 406. Co. Lit. 247 b.
248 a. 337 b. F. N. B. 192. Bro.
Ab. tit. Dum fuit, &c. pl. 3. 3 Burr.
1808.

³ Godb. 365. 8 Co. Rep. 44. in
Whittingham's ca.

⁴ Co. Lit. 51 b. Shep. To. 299.
[7th ed.]

⁵ 1 Co. Rep. 96. cites 14 H. 6.

fo. 2. 3 Burr. 1804.

⁶ Bro. Ab. tit. Dum fuit, &c.

pl. 1.

⁷ Lit. s. 259.

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 of infants.*

**Alienation
 by husband
 and wife.**

**Bargain
 and sale
 of a use.**

Partition.

**Surrender
 of copy-
 holds.**

cannot plead *non est factum* to his deed as a feme-covert may, but must plead the infancy specially¹; and that such plea avoids it by relation back to the delivery, because it has an operation from the delivery, and not because it has the form of a deed.²

And if husband and wife are both within age, and they alien the wife's land, and the husband dies; it is at her election to affirm the alienation, and to take to it, or to enter.³

It is stated by a considerable authority, that if an infant bargain and sell his land for money, for commons or teaching, it is good with averment; if for money otherwise; that if payment of the money be proved, the deed is voidable; that if the money be not paid, it is void: but that he cannot raise a use by covenant to stand seised in consideration of blood or marriage.⁴ And it is said, that if an infant by indenture bargains and sells his lands for money, and afterwards levies a fine come CEO, &c.; this indenture is not void, but voidable, and the use passes by the bargain; then the fine being upon it, the bargain is irrevocable, unless for error.⁵ We find it however laid down by Lord Coke⁶, that an infant cannot raise a use by his bargain and sale.

If an unequal partition be made between two coparceners, one of whom is an infant, and hath the lesser part, such partition is not void, but voidable only, and the infant may elect either to affirm the partition at her full age, by taking the profits of the unequal part allotted to her, or to avoid the same during her minority or at full age, by entering into the part allotted to her sister.⁷

And the surrenders by infants of copyhold property are voidable only, and not *ipso facto* void.⁸ An infant may

¹ See 3 P. Wms. 208. in *Nightingale v. Ferrers*; and 2 H. Bl. 515. in *Keane v. Boycott*.

² 3 Burr. 1805.

³ Bro. Ab. tit. *Coverture*, pl. 60. Co. Lit. 337a. F. N. B. 192.

⁴ Bac. Uses, 67.

⁵ Mo. 22. pl. 75. ⁷ 2 Inst. 673.; and see 2 Pr. Conv. 250.

⁶ Lit. s. 258. Co. Lit. 171 b.

⁸ 3 Burr. 1806. Co. Lit. 51 b. n. (3). [17th ed.]

therefore surrender a copyhold estate held for lives, for the purpose of effecting a renewal, subject to his right of avoiding the same when of age.^b

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of infants.*

And if an infant surrenders a copyhold estate to the use of a stranger, who is admitted, the infant may enter at full age, such surrender being no bar nor discontinuance.^c And where a copyhold was granted to one for life, remainder to an infant in fee, and they both joined in a surrender to one who was admitted, and the tenant for life died, and afterwards the infant died, and his heir entered; it was adjudged that the entry was good, such surrender being but a conveyance by matter in pais, and that the heir might enter and bring trespass before admittance.^d

And where an infant copyholder in fee made a lease for years by parole without the lord's licence, rendering rent, and at full age was admitted, and accepted the rent, and afterwards ousted his lessee, who brought ejectment; — it was adjudged that the lease was good till avoided; and that admitting it to be a forfeiture, yet if the lord entered for it, the infant might re-enter upon him; and that by accepting the rent at full age, the infant had made the lease good and unavoidable.^e

*Lease of
copyholds.*

If an infant within age seised of rent, purchase the land, and alien the land within age, he shall have election whether he will demand the land or the rent.^f

*Purchase
by infant.*

Indeed it may be asserted as a general proposition, that if infants purchase property, they may elect at their full age either to abide by their purchase, or to disavow the same; and that if they do not agree to the purchase after their full age, their heirs may exercise the same election as their ancestors might have done.^g

Whether an infant can waive an English dignity conferred on him by the crown, is said to be a doubtful point.

*Whether
infant can
waive an*

^b 1 Scriv. Cop. 148. [2d ed.]

^c Latch. 199. Godb. 364. W.

^c Gooles v. Grane, Mo. 537. Popl. 59. in Bullock v. Dibler.

^d Jo. 157. Ashfield and Ashfield,

Noy, 92.

^e Knight v. Fortipan, Cro. El. 90. 1 Leon. 95.

^f Bro. Ab. tit. Coverture, pl. 12.

^g Co. Lit. 2b. Sug. V. & P. 502.

[5th ed.]

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English
dignity.
Lease by
infant void-
able.

It seems that by the law of Scotland a person cannot refuse or waive a patent of peerage granted him during his infancy.^h

In regard to leases made by infants, a distinction seems to have been formerly taken between those which contained a reservation of rent, and those containing no such reservation, the former being considered as voidable only, but the latter being treated, according to the opinion expressed in the greater number of books, as absolutely void.ⁱ In the case however of *Zouch v. Parsons*^j, this distinction was denied, and the leases of infants, whether with or without rent, if made by deed, were considered as voidable only.

And it was observed by the chief justice in delivering the judgment of the Court upon that case, that though there were many obiter sayings, yet there was no sufficient authority clearly to outweigh the reasons against the position of such leases being void: — and he remarked, that in *Humphreston's case*^k, which approached the nearest to an authority, the judgment was upon the right and merits of the case, and not upon the point of the lease: — that the question as to the lease arose upon the fictitious lease to try the infant lessor of the plaintiff's title in ejectment: — that two justices held, that no rent being reserved, there was no semblance of benefit to the infant, whereas in truth it was greatly for his benefit: — that the objection was turning his own privilege of infancy against him to bar his recovering; and that besides the lease was by parol: — that very prejudicial leases might be made though a nominal rent were reserved, and that there might be most beneficial considerations for a lease though no rent were reserved.

And the circumstance of the lessee of an infant lessor not being able to avoid the lease of the latter, seems to have had considerable weight with the Court in showing

^h See *Cru. Dign.* 95, 96, 97.

ⁱ *Rol. Rep.* 441. *1 Mod.* 263. in

ⁱ See accord. *Lane v. Cowper*,
Mo. 105. in pl. 248. *Humphres-*
ton's ca. 2 *Leon.* 216. *Co. Lit.* 45b.
308a. 1 *Brownl.* 120. *Hutt.* 102.

^j *Barker v. Keate.*

^j 3 *Burr.* 1806.; and see *Mad-*
don v. White, 2 *T.R.* 159.

^k 2 *Leon.* 216.

such lease not to be void but voidable only.¹ And this calls for the observation, that there are numberless cases to prove, that a party contracting with an infant, cannot avail himself of the infancy.^m

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of infants.*

And a lease made by an infant to try the title to land will be good, though the inclination of opinions seems to have been formerly the other way.ⁿ And it is competent to an infant, after his lessee has entered, to elect either to charge him in assise, or to bring debt for the rent, or to accept the rent at his full age, or to have trespass against the lessee for the occupation.^o

And where an infant makes a lease for years, reserving rent, and the lessee enters, the infant hath election to allow him to be his tenant or disseisor, whichever is most to his advantage. So where one enters and claims as guardian, and occupies, the infant may allow him to be either disseisor or accountant, whichever shall be for his best advantage.^p

The like privilege which an infant has of avoiding leases made by him, he also enjoys of avoiding leases made to him; for if a lease for years be made to an infant, rendering rent, it is voidable only at his election; for if it be to his benefit, it shall be no ways void, but he may at this election make it void by refusing and waving the land before the rent-day comes, and then no action of debt will lie against him.^q — And in an action of debt against an infant lessee for rent, it not being shown that the rent was of greater value than the land, it was adjudged for the plaintiff.^r

But though it be quite clear that a person who accepts a lease during his infancy, may avoid it after he comes

*So lease to
infant.*

*Considera-
tion for
such lease*

¹ See accord. 1 Mod. 25. in Smith v. Bowin. Sid. 42. in pl. 8. Forrester's ca. Fitzgib. 176. 275. in Holt v. Ward.

^m See 1 Fon. Eq. 80. in n. (b). and the cases there referred to.

ⁿ 3 Burr. 1806. Noy, 150. in Raines v. Machin. Humphreston's

ca. 2 Leon. 216. Mo. 103. 105. pl. 248. in Lane v. Cowper.

^o Cro. Car. 305. pl. 6. in Blunden v. Baugh. 1 Rol. Ab. 729, 730.

^p Cro. Car. 306. in Blunden v. Baugh.

^q Ketley's ca. Brownl. 120. Cro. Jac. 320. pl. 1.

^r Kirton v. Elliott, 2 Bulst. 69.

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not recover-
able.

of age, and before confirmation, yet he has merely an election to avoid it; he may avoid the performance of the covenants contained therein, or the payment of the rent, but he can go no further: with respect to any consideration he may have given for the lease, he is not, by law, entitled to recover it back, although there may be a complete failure of such consideration by subsequent events: for an infant having paid money as a consideration for a lease, is confined to his election of retaining the lease, or putting an end to it, but cannot recover back the money for it.^{*}

So Lord Mansfield is reported to have said, that if an infant pays money with his own hand, without a valuable consideration, he cannot get it back again.^t

Surrender
of lease
voidable.

It seems also to have been formerly considered, that the surrender of an infant could not be by deed, but was absolutely void; and the case of *Lloyd v. Gregory*^u has been adduced as an authority warranting this principle. And in *Thompson v. Leach*^v, where the surrender of a person non-compos was adjudged to be absolutely void, the preceding case was cited as an authority in point, that a surrender by an infant was ipso facto void, and so of a person non-compos; and the grants of infants and persons non-compos were said to be parallel both in law and reason.

But in the case of *Zouch v. Parsons*^w, the Court treated such surrender as voidable only, observing that Sir William Jones, one of the three judges who decided the case of *Lloyd v. Gregory*, reported that the second lease being void, made an end of the question, the judges giving no opinion upon the other points; and that this report was certainly right; that no surrender express or implied in order to or in consideration of a new lease would bind, if the new lease was absolutely void, for the cause ground and condition of the surrender failed: and that in *Thompson*

* See *Holmes v. Blogg*, 2 Mo. 552. v 3 Mod. 310. Show. Parl. Ca. 150. 2 Salk. 427. Ld. Raym. 313.

^t See *Wilmot's Op.* 226.

^u Cro. Car. 502. 1 Rol. Ab. 728. 2 Rol. Rep. 408. W. Jo. 405. 1 Show. 296. Comyn, 45. 3 Salk. 300. pl. 10. Carth. 435. Comb. 458.

^w 3 Burr. 1807.

v. Leach, supposing the comparison between an infant and a man non-compos just, (which it was not,) the point of the surrender being void or voidable, was not necessary to the judgment of the case. And the Chief Justice observed, he knew of no judgment upon the ground that such a surrender was void; but that most undoubtedly the other party could not say so: — that if an infant was to surrender an unprofitable lease, and after acceptance the premises should be burnt, overflowed, or otherwise destroyed, the lessor never could say the surrender was void: — that there was no instance where the other party to a deed could object on account of infancy; consequently, that the infant might let the surrender stand or avoid it, which proved it to be voidable only.

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With respect to the contracts of infants in general, it has been laid down, that where the contract may be for the benefit of the infant, or to his prejudice, the law so far protects him as to give him an opportunity to consider it when he comes of age; and that it is good or voidable at his election.*

Contracts
voidable.

In regard to the period of time at which it is proper that the voidable dispositions made by infants of their estates should be avoided, it depends upon the circumstance whether such dispositions were effected by matters of record, or matters en fait; if by the latter, it is competent to the infant to avoid them, either within age, or at any time after his full age, and before he consents to them; if by the former, as statutes merchant and of the staple, recognizances acknowledged by him, a fine levied by him, or a recovery against him by default in a real action, (saving in dower), they must be avoided by him, viz. statutes, &c., by auditâ querelâ, and the fine and recovery by writ of error during his minority; for being judicial acts, and taken by a court or judge, the nonage of the party to avoid the same shall be tried by inspection of judges, and not by the

Disposi-
tions, when
to be
avoided.

* Per Lord Raymond in Holt v. Chillesford, 4 Bar. & Cr. 100.; and Clarendieux, Stra. 937. Per Ab- see Bruce v. Warwick, 6 Taunt. bott C. J. in Rex v. Inhabitants of 118.

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country: and since the nonage must be tried by inspection, this cannot be done after his full age: but if the age be inspected by the judges, and it be recorded that the infant is within age, albeit he come of full age before the reversal, yet it may be effected after his full age.^y

But a fine levied by an infant cannot it seems be set aside after his death.

For where a fine was levied by an infant feme covert, and she and her husband, on being examined as to her age, answered that she was of age, and afterwards on her being examined privately as to her consent, she answered that she was under no restraint, but was not then questioned as to her age, and about two years after she died without issue; the Court agreed there was no way to set the fine aside.^x

If an infant suffers a common recovery in which he comes in as youchee in person, and not by guardian; though he may have a writ of error to avoid the same for error in law, yet he cannot enter into the land, and avoid the recovery by such entry, before he has reversed it in a writ of error.^a

But if an infant suffers a common recovery in which he appears by attorney, he may reverse it for error after he has attained his full age, since it shall be tried by the country whether the warrant of attorney was made when under age or not.^b The reason for which Mr. Cruise assigns to be, because an infant is not presumed to have sufficient understanding to choose a proper person as his attorney, and the law will not put it in his power to hurt himself; for if he is deceived and prejudiced by the recovery, he can have no remedy against his attorney.^c

And where, upon a writ brought by those in remainder to reverse a common recovery, the error assigned was, that

^y Co. Lit. 151 a. 380 b. 2 Inst. 483. Keckwich's ca. Mo. 844. pl. 1139.; and see Godb. 120. pl. 141.

^x Barrow v. Parrot, 1 Mod. 250.

^a 1 Rol. Ab. 749. Ailet v. Wat-

^b Zouch v. Michil, Godb. 161. Sid. 321, 322. 1 Lev. 142. Stokes v. Oliver, 5 Mod. 289.

^c Cru. Recov. 181.

the vouchee was an infant, and appeared by attorney; it was held that this might well be assigned for error after the death of the infant, it not being tried by inspection, as in the case of a fine.^d

Brooke says, that an infant who is bound in a statute staple or the like shall reverse it by auditā querelā at full age or within age^e: but it seems an infant is not relievable by auditā querelā after full age against a statute or recognizance by him entered into.^f

III. What dispositions of infants affecting their real estates are void, and incapable of being afterwards affirmed.

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of infants.*

What dis-
positions
are void.

This inquiry may be entered upon by adverting to the law as laid down by Perkins^g, and recognized by the Court of King's Bench^h; — that all such gifts, grants, or deeds made by infants, which do not take effect by delivery of their hands, are void.

It will occur to the mind of the reader, that those dicta or decisions touching the inquiry before us, which were in existence previously to the determination of the case of *Zouch v. Parsons*ⁱ, must now be read with a degree of suspicion, and received with caution as affording data upon which future opinions are to be formed, since such dicta or decisions may prove to have their foundation in principles which may be now held untenable.

It was there said by the Court^j, that if a new case should arise where it would be more beneficial to the infant that the deed should be considered as void, — if he might waive a forfeiture, or be subject to damages or a breach of trust in respect of a third person, unless it was deemed void, — the reason of the privilege, which made the deeds of infants voidable only, would warrant an exception in such cases to the general rule. And upon the whole it appears, that the benefit of the infant constitutes the criterion of the validity or invalidity of his deeds.

^a Holland v. Dauntsey, Cro. El. 729.

^g Perk. s. 12.

^b Bro. Ab. tit. Coverture, pl. 64.

^h 3 Burr. 1804.

^c Worley's ca. Mo. 75, pl. 206.

ⁱ Ibid. 1794.

^d Arg. 2 And. 158.

^j Ibid. 1807, 1808.

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Feoffment
to guar-
dian.

Power of
attorney to
deliver
seisin.

Annuity
contracts.

Grant of
rent-charge.

Grant of
advowson.

Sale of
term.

Election to
avoid dis-
positions by
whom ex-
ercisable.

If then an infant in ward to guardian in socage enfeoffs the guardian, this is void for the deceit that the law intends in him that hath the command of him; and the breach of trust which the law reposes in him.^k

Of the contracts of infants some are merely void, namely, such as a court can pronounce to their prejudice. Therefore a power of attorney given by an infant to another, to enable him to deliver seisin, is void, forming thereby an exception to the general rule, which makes the deeds of infants voidable only.^l

And all contracts with infants for the purchase of annuities are expressly made void by statute law, and incapable of being confirmed by them on attaining twenty-one.^m

It has been said, that if an infant grants a rent-charge out of his land, it is not voidable, but ipso facto void; and that if the grantee distrains for the rent, the infant may have an action of trespass against him.ⁿ But it is stated to have been previously held, that such a grant is only voidable^o; and it seems not improbable that it might at the present day be considered as voidable only, if not obviously prejudicial to the infant.

And we find it said, that if an infant grants an advowson, and at his full age confirms the grant, yet it is not good, for the first grant was void.^p And that if an infant possessed of a term for years sells it for money, and after he comes of full age receives part of the money for it, he shall avoid the grant notwithstanding, for the contract being void in the commencement, it cannot be made good by any subsequent act.^q These two last propositions however must be viewed with suspicion, as similar cases might not now induce like decisions.

IV. By whom an election to avoid the voidable dispositions of infants may and may not be exercised..

^k 1 Rol. Ab. 728. Fitz. Ab. tit. Assise, pl. 322. ^o 3 Bac. Ab. 159. cites Hudson v. Jones.

^l 3 Burr. 1808. Perk. s. 13.

^m See 53 G. 3. c. 141. s. 8.

ⁿ 3 Mod. 310.

^p Bro. Ab. tit. Coverture, pl. 1.

cites 26 H. 8.

^q Dal. 64. pl. 25.

The voidable acts of infants can be avoided only by the infants themselves, and those claiming under them in sprivity of blood, as the heirs general or special, and who have a right descended to them from such infant ancestors.¹

As if an infant seized in fee, or in tail male, makes a feoffment in fee, and dies; in the former case his heir, and in the latter case his son, being heir general and special, may enter. And if such infant tenant in tail male had issue two sons, and the elder had issue a daughter, and the infant donee had died, and the elder son within age had made a feoffment, and died without issue male; the younger son is special heir per formam doni, and shall avoid his brother's feoffment, although he be not general heir, being privy in blood and having the land by descent.² And if an infant tenant in tail female makes a feoffment in fee, and dies, having issue a son and a daughter; the daughter, to whom the right of entry descends, shall avoid the feoffment, and not the son who had nothing by descent.³

And if tenant in tail of land of the custom of borough English makes a feoffment in fee within age, and dies, the youngest son shall avoid it, for he is privy in blood and claimeth by descent from the infant.⁴

But persons connected with infants in privity of estate only cannot avoid the dispositions made by such infants.

As if an infant tenant in tail makes a feoffment in fee, and dies without leaving issue, it is not competent to the donor to enter, there being a privity between them in estate only, and no right having accrued to the donor by the death of the infant donee.⁵ But this was denied to be law by Whittingham, J., who said, that a feoffment by an infant could not pass him to his donee by a diaentitance, and then if he could not enter, he would be without remedy.

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By privies
in blood.

Not by
privies in
estate.

¹ Whittingham's ca. 8 Co. Rep. 42 b. 44 a. 2 Inst. 483. 1 Rol. Rep. 401.

² 8 Co. Rep. 43 a.

³ 8 Co. Rep. 43 a. Co. Lit. 337 b.
⁴ Co. Lit. 337 b.
⁵ 8 Co. Rep. 43 a.

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By whom, in reference to estate of feme covert.

Again; if a husband within age, seised in right of his wife, makes a feoffment in fee and dies, his heir cannot enter, no right having descended to him; but since the husband, if he had lived, might have entered in the life of his wife only, and not in respect of any right which he himself had, the wife, (even before the 32. H. 8. c. 28.,) might in such case have entered in her own right.^w If however the wife be only tenant in tail, and the husband within age makes a gift in tail to another, by which he acquires a new reversion in fee, and then dies; either the wife may enter, or the heir of the husband who has a new reversion descended to him; but if the latter enters, and thereby defeats the estate tail given by the infant, the new reversion vanishes from such heir, and vests in the wife, who is immediately seised of her old estate by operation of law.^x

By remainder man.

It may be added, that if tenant in tail within age being vouched in a common recovery appears by attorney when he ought to have appeared by guardian; he in remainder may assign this for error, being a party in interest to the recovery; and the appearance by attorney is void.^y

Not by privies in law.

Neither shall privies in law, as the lord by escheat, avoid conveyances made by infants.

Therefore if an infant makes a feoffment and dies without heir, the lord shall not avoid it, being a stranger to the infant; and the feoffment is unavoidable.^z

In the case where this point was agreed to, the feoffment proved to be executed by letter of attorney made by the infant, for which reason it was resolved to be void, and that the land should escheat to the queen.

V. The commission of what acts by adults will be considered as demonstrative of an election to affirm their voidable dispositions made under the disability of infancy.

Voidable dispositions by what acts confirmed.

^w 8 Co. Rep. 43b. Lit. s. 633. ^x Whittingham's ca. 8 Co. Rep. Co. Lit. 336 b. ^y 42b. 45a. 3 Mod. 306. Bridg. 44. ^z 8 Co. Rep. 43b. Co. Lit. 337 a. in arg. ¹ Rol. Ab. 755. 1 Rol. Rep. 301. Cro. El. 739.

If the act of an infant be merely voidable and not void, and it is confirmed after he becomes adult, it is unobjectionable.^a

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And in every voidable contract made by an infant, it seems advisable that notice of his intention to affirm or disaffirm the same should be given by him within a reasonable time after coming of age: but it should seem that an affirmation or disaffirmance of such contract may be collected from circumstances independently of any such notice. And from the case of *Doe v. Smith*^b it may be inferred, that where it is incumbent on an infant to make an election on coming of age, and he suffers nearly a year to elapse before electing, that would be unreasonable; but that if he elects within a week or a fortnight, that would be reasonable.

If then an infant makes a feoffment or lease for life to commence in futuro, and at full age makes livery, this is a good feoffment or lease.^c

By livery
of seisin at
full age.

And if he makes an exchange of lands, and continues to occupy the lands taken in exchange after he comes of age, the exchange is thereby rendered perfect.^d

Continu-
ance to oc-
upy on
exchange.

And if upon a partition wherein an infant is concerned, an unequal part be allotted to him, which causes such partition to be voidable; if he takes the profits of the unequal part after his full age, the partition is made good for ever.^e

Taking
profits on
unequal
partition.

So if an infant makes an indenture, and at his full age binds himself to perform it, he shall not avoid the same.^f

Becoming
bound to
perform
indenture.

The acceptance by an infant on attaining his full age of rent reserved upon a voidable instrument made during his minority will render the same conclusive upon him.

Acceptance
of rent.

Therefore we find it said, that if an infant leaseth for years, rendering rent, and at his full age accepts the rent^g;

^a See 2 Mad. 51.

^e Co. Lit. 171 b.

^b 2 T. R. 436.

^f Bro. Ab. tit. Coverture, pl. 28.

^c 2 Rol. Rep. 109.

^g 3 Leon. 271. in Butler and

^d Co. Lit. 51 b. Bro. Ab. tit. Co-
verture, pl. 17. 2 Vern. 225. per
Cur. Perk. s. 295.

Baker's ca.

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Words
spoken.

Continu-
ance to
occupy
land leased
at full age.

Receiving
interest
under
agreement.

Laches.

or makes a feoffment in fee, reserving rent, and receives the rent at full age; he will be bound.^b

And where an infant, who during his minority had made a lease to another for years, rendering rent, on coming to his full age said to the lessee; "God give you joy of it;" this expression was held to affirm and make good the lease.^c

And if a lease for years of land be made to an infant, rendering rent, which becomes in arrear for several years, and then the infant comes of full age, and still continues the occupation of the land; this will render the lease good and unavoidable, and consequently make the infant chargeable with the arrears incurred during his minority.^d

If an infant makes an agreement, and receives interest under it after he comes of full age; such agreement will be decreed against him.^e And even a partial accession by him when of age to an agreement made during minority would be considered an election to abide by the same.^f

But the protection afforded to infants is continued after they have attained twenty-one, until they have acquired all the information which might have been had in adult years.^m

And where an infant desired that lands, which were subjected to a trust for the payment of younger children's portions, might not be sold; and by his answer offered to settle other lands for the raising of such portions; he was held to be bound by the offer made in his answer, if the other side were thereby delayed; for if he would have departed from it, he ought immediately after coming of age to have applied to the Court, in order to retract the offer and amend his answer.ⁿ

^a Bro. Ab. tit. Barre, pl. 27. tit. pl. 28.

ⁱ 4 Leon. 4. pl. 15.

^j Ketsey's ca. Cro. Jac. 320. 1 Rol. Ab. 731.

^k Franklin v. Thornebury, 1 Vern. 132. 3 Atk. 616.

^l See 18 Ves. 276, 277. in Mil-

ner v. Lord Harewood.

^m See accord. 3 Swanst. 69. in

Walker v. Symonds.

ⁿ Cecil v. Earl of Salisbury,

2 Vern 224. pl. 206.

Again, where a testator devised land and houses to his six children; and the mother, acting as their guardian, they being all infants, granted a building lease for forty-one years; and the eldest son, who was about nineteen years of age, joined, and covenanted for quiet enjoyment, and that the other children when of age should confirm; and they all attained twenty-one, and accepted the rent for ten years after the youngest came of age: on a bill brought to establish the lease, the same was decreed accordingly.^o

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*Acquies-
cence.*

To the foregoing cases exemplifying the inquiry under consideration it may be added, that if an infant, after having traded in partnership with an adult, on attaining twenty-one neglect notifying to the world that he has ceased to be a partner; he will be liable for goods sold on the partnership credit to the person with whom he had been partner, his negligence in not disaffirming the partnership being an affirmation of its continuation.^p

Negative
conduct.

SECTION 2.

Election considered in application to the dispositions of persons non-compos mentis, and persons under duress.

It is laid down by a text-writer of great authority^q, that conveyances and purchases made by idiots and persons of non-sane memory are not absolutely void as against themselves, but voidable only, and capable of being either avoided or affirmed on their subsequent restoration to a state of reason. By other authorities it is said, that the deed feoffment or grant of a person non-compos is voidable, yet that it cannot be avoided by himself, since he is not permitted to disable his own person; but may be avoided by those privy to him in blood.^r

As to the
dispositions
of persons
non-com-
pos.

^o Smith v. Low, 1 Atk. 489.

^p Goode v. Harrison, sittings before M. T. 1821.

^q See 2 Bl. Com. 291.

^r Lit. s. 405. Co. Lit. 247 a, b.
Beverley's ca. 4 Co. Rep. 123 b.

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of persons
non-com-
pos, and
under
duress.

156. 11.

Deeds of
persons
non-com-
pos, if of
record, un-
avoidable.

Voluntary
grants by
copyhold
lord.

The point then upon which these authorities seem to differ is, whether it be competent to a non-sane person, on being brought to a right mind, to allege his insanity in order to invalidate his own act.

The learned author of the Commentaries has traced to their source the grounds whence he supposes the maxim that a man shall not stultify himself to have originated^a; and adopts the opinion of Fitzherbert^b, that a non-compos may plead his disability to avoid his own acts, as well as an infant. And though this opinion was denied to be law in a case where a plea of non-sane memory to an action of debt upon an obligation was held bad^c, yet in a later case such a plea was maintained.^d

It seems to be clearly established, that an idiot, or person non-compos, will not be permitted to overturn acts of record.^e If therefore he levy a fine, the same indulgence of avoiding it is not extended to him as to an infant during minority.^f And a recovery suffered by him to which he appears in person will be unavoidable: but if he appear by attorney, then it has been thought that an averment of idiocy would be admitted^g, upon the same principle that a recovery suffered by an infant in a parallel case is capable of being set aside after his full age.^h Also a deed declaring the uses of the fine or recovery will be good, as forming part of those assurances.ⁱ

If the lord of a copyhold manor be non-compos, yet he is said to be capable of making voluntary grants by copy^j, though it seems that his committee cannot.^k

But the Court of Chancery will in many cases interpose its authority, and set the dispositions of persons non-

^a 2 Bl. Com. 291, 292.; and see 1 Fon. Eq. 48. and notes.

^b F. N. B. 202.

^c Stroud v. Marshal, Cro. El. 398.

^d Yate v. Boen, Stra. 1104.

^e See 4 Co. Rep. 124 a. and Mansfield's ca. 12 Co. Rep. 123.

^f See supra, page 56.

^g 1 Cru. Dig. 453. pl. 19. Cru. Recov. 185.

^h See supra, page 64.

ⁱ 4 Cru. Dig. 165. pl. 37. Hob. 224.

^j Co. Cop. s. 34. pa. 80.; but query whether it would be now so held.

^k Blewet's ca. Ley. 47, 48.

compos aside.⁴ And the king may upon office found avoid their grants or other acts, excepting those of record.⁵ With respect however to the void or voidable property of the deeds of persons non-compos, other than those of record, it seems to be now the better opinion, grounded upon the authority of *Thompson v. Leach*⁶, that the feoffment of a lunatic with livery of seisin in person is, by reason of its solemnity, only voidable, but that his bargain and sale or surrender, &c. is absolutely void: and that although he cannot defeat the feoffment by showing his own disability, yet he may do so with respect to other instruments. And the reason of the plea of non-sane memory having been admitted in the case of *Yate v. Boen* has been attributed to the decision which the case of *Thompson v. Leach* received.⁸

Yet the observation of Lord Mansfield upon the latter case⁹, viz. that the point of the surrender being void or voidable was not necessary to the judgment, may probably be considered as having much depreciated its authority.

By statute law¹, provisions are made for the conveyances of estates vested in idiots and lunatics in trust or by way of mortgage; for the surrender of leases for the purpose of renewal²; for the granting of new ones³; and for the sale or mortgage of their estates, and granting leases thereof.¹

Assuming then that the deeds of persons non-compos, if of record, are unavoidable, that their feoffments are voidable, and their deeds of an innocent nature absolutely void; as to their feoffments the authorities seem agreed, that if such persons die without recovering their reason; or if upon afterwards regaining their senses, they

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pos, and
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Feoffment
voidable.
Bargain
and sale
surrender,
&c. void.

Convey-
ances sanc-
tioned by
statute
binding.

Deeds of
non-com-
pos when
voidable by
his heirs.

⁴ See accord. *Clerk v. Clerk*, ¹ See *3 Burr. 1807.*; and *supra*,
2 Vern. 412. *Addison v. Dawson*, page 63.

⁵ *ibid. 678. 1 Fon. Eq. 53. in n. (k).*

⁶ *G. 4. c. 74.*

⁷ *Co. Lit. 247 a. 4 Co. Rep.*

⁸ *29 G. 2. c. 31.*

^{126 b. 2 Bl. Com. 291.}

⁹ *11 G. 3. c. 20.*

¹⁰ *3 Mod. 296. 301.*

¹¹ *43 G. 3. c. 75.*

¹² See *Sug. Pow. 402, 403. 1 Pr.*
Abs. 327. Shep. To. 233. [7th ed.]

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*Feoffment
of non-
compos by
attorney
when void.*

*Purchases
when not
wavable by
him, but by
his heir.*

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duress.*

do not agree thereto; their heirs may either avoid or affirm the same.^m

Yet the feoffment of a person *non-compos*, if made by letter of attorney, though good against himself, is said to be void as to all others upon his death.ⁿ And it would now probably be deemed void ab initio.

If one of non-sane memory purchase land, he cannot himself waive the purchase; but upon his death without agreeing thereto, his heir may waive it. So likewise it is of an idiot.^o

As to the dispositions of persons under duress or illegal restraint, it may be shortly stated, that their conveyances and purchases may be either avoided or affirmed, whenever the duress ceases^p: for the law not suffering any undue advantage to be taken of their defenceless condition therefore provides for them a way to escape.

^m *Perk. c. 21. Cogit. Ab. 2 Bl. Com. 292. 2 Inst. 183.*
Com. 292.

ⁿ *4 Co. Rep. 125.*
^o *Ca. Lit. 2 b.*

^p *2 Bl. Com. 292. 2 Inst. 183.*
⁵ *Co. Rep. 119 a. Bro. Ab. tit.*
Feoffm. de Terres, pl. 48.

CHAP. III.

ELECTION CONSIDERED IN APPLICATION TO SUCH DISPOSITIONS OF PROPERTY AS ARE VOIDABLE BY REASON OF A DISABILITY OF ESTATE.

IT is purposed in the present chapter to consider the law of election in application to those cases, where, in consequence of the inability incident to certain classes of persons to make absolute and indefeasible dispositions of their property, the same may subsequently become capable of being either avoided or affirmed: — and herein an inquiry will be made into the dispositions of tenants in tail, — of husbands seized in right of their wives, — of sole and aggregate corporations, — of mortgagors, — of disseisors and others having wrongful titles, — of guardians in socage, and testamentary guardians, — of administrators durante minoritate, — and of copyholders.

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SECTION I.

Elections considered in application to the dispositions of Tenants in Tail.

Of the several dispositions capable of being made affecting the property of tenants in tail, some are absolutely binding upon the issue in tail, and unavoidable by them upon the death of the ancestor; some are voidable only by them, and therefore the subject of election; whilst others are absolutely void ab initio as against the issue, and incapable of their confirmation.* The power of election therefore being applicable only to such dispositions as are voidable, it is with those we shall be more immediately

Disposition
of tenants in
tail how
classed.

* Co. Lit. 327 b.

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of tenants
in tail.*

concerned; but in order to ascertain what dispositions are contained under the latter denomination, it will be necessary to consider as well those contained under the two former ones, namely, such dispositions as are incapable of being avoided, and such as are absolutely void.

The present inquiry is meant to extend to the dispositions of tenants in tail in general, with the exception only of leases for years, which will be considered in the next section.

The inquiry before us may be made under the following subdivisions:

I. What dispositions made by tenants in tail of the entailed property are absolutely binding upon the issue in tail, and not capable of being avoided by them.

II. What dispositions are voidable, and capable of being either avoided or affirmed by the issue in tail at election.

III. What dispositions are absolutely void as regards the issue in tail, and incapable of being affirmed.

IV. The commission of what acts by the issue in tail does and does not preclude an election to avoid or affirm the voidable dispositions of the ancestor tenant in tail.

I. What dispositions made by tenants in tail of the entailed property are absolutely binding upon the issue in tail, and not capable of being avoided by them.

Generally speaking, a tenant in tail, whether legal or equitable, cannot make such a disposition of the entailed property as will be conclusive upon the issue and remaindermen, unless by fine or recovery, the latter mode of conveyance being absolutely requisite in those cases only, where the tenant in tail is not entitled to the remainder or reversion immediately expectant on his estate tail. A tenant in tail in possession may however in some cases make a good conveyance in fee simple by his grant and warranty, which, if accompanied with assets, will bar his own issue, and without assets, such of his heirs as may be in remainder or reversion.^b But this method of barring entails is

What dis-
positions
are binding.

Fine and
recovery.

Warranty
and assets.

^b See 2 Bl. Com. 305.

now seldom if ever resorted to, and a title depending upon it cannot be considered as marketable.^c

It was formerly held, that the entail of a trust estate was alienable by him who had an estate of inheritance in the trust, by any conveyance or instrument whence an intention to pass the estate could be collected. Therefore we find it to have been decided, that a recovery, defective as to a tenant to the praecipe^d, — and the feoffment of the cestui-que-trust in tail and the legal trustees^e, were sufficient to bar the estate tail. But in *Legate v. Sewell*^f, Lord Cowper said he doubted whether a deed only executed by cestui-que-trust in tail should bar the remainder man, or even the issue, in regard a deed might be made at a tavern or by surprise. Lord Hardwicke has also said^g, that it had been the opinion of some judges that an equitable estate tail at common law might be barred even by a deed of bargain and sale enrolled, but that it had been held otherwise since, and that now a recovery was necessary. And it has been long settled, that the same rules and solemnities are as essential to the barring an equitable estate tail, as a legal one.

But a recovery suffered of an equitable estate can only affect equitable remainders, and the person suffering it must have such an equitable estate as, had it been a legal estate, would have enabled him to suffer a legal recovery; and an equitable estate cannot in suffering a recovery be blended with a legal one^h: so that a legal remainder cannot be affected by a recovery with an equitable tenant to the praecipe. The converse of this proposition however does not hold, for if there be as well a legal as an equitable estate in the tenant to the praecipe, an equitable remainder may notwithstanding be barred.ⁱ

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Sect. 1.

As to the dispositions of tenants in tail.

Equitable recovery.

^c See Shep. To. 182. 192. 194.
[7th ed.]

^f 1 P. Wms. 91.

^d Beverley v. Beverley, 2 Vern. 131.

^g See 3 Atk. 815.; and see Kirk-

^e Bowater v. Elly, 2 Vern. 344.
Prec. Ch. 81.

^h C. 72. in n.

ⁱ See 3 Ves. 125, 126.

CHAP. XII.
Sec. I.
*As to the
dispositions
of tenures
in tail.*

And if an estate be limited unto and to the use of A. in fee, in trust for B. in tail, remainder in trust for C. in tail; a recovery suffered by B., the tenant to the pucipe being made by himself alone, will bar the remainder over in A., the same not being a legal one: for a partial interest in the beneficial or equitable interest may co-exist with a legal trust estate in fee for the benefit of the person in whom the latter estate is vested; since the rule that a legal and equitable estate cannot subsist in the same person must be always understood with the restriction that it is the same estate in equity and at law.¹

And the more generally received opinion now appears to be, that the same measures are as necessary to be taken for the purpose of barring an equitable estate in copyhold property, as a legal estate²; though Lord Hardwicks is reported to have unqualifiedly said, 'that such equitable estate might be barred by surrender.'³

*Convey-
ances sanc-
tioned by
statute.*

But the issue in tail are also capable of being bound under the operation of particular statutes. Thus the appointment of tenant in tail to a charitable use under the statute of 43. Eliz. c. 4. has been held binding upon the issue in tail, and those in remainder, without either fine or recovery.⁴ Also bargains and sales under the land tax redemption acts⁵, and bargains and sales made by the commissioners of bankrupt tenants in tail under the recent statute for amending the bankrupt laws⁶, will be as conclusive upon the issue in tail, and those in remainder or reversion, as the fine or recovery of the bankrupt himself would have been. And tenants in tail and their issue, and also persons in remainder or reversion, will in some cases be bound by the decree of a court of equity.⁷

*Decree of
court of
equity.*

Further, the differences existing between the dispositions of tenants in tail have been thus stated: that where the

¹ Philips v. Brydges, 3 Ves. 190.

² Tay v. Slaughter, Prec. Gh.

³ See Sug. V. & P. 177. [5th ed.]

⁴ 16.; but now see 9 G. 2. c. 56.

⁵ Ed.] Scriv. Cop. 75. [2. ed.]

⁶ 42 G. 3. c. 116. s. 52.

⁶ See Radford v. Wilson, 3 Atk. 815.

⁷ 6 G. 4. c. 16. s. 65.

⁸ Reynaldson v. Perkins, Amb.

set of the ancestor is apparently mischievous to the issue, ^{Chap. III.}
it becomes absolutely void by his death; that where it is ^{Sect. 1.}
apparently beneficial, it is absolutely good and binding ^{As to the}
for ever; and that where it is indifferent, and doubtful ^{dispositions}
whether it will be for profit or loss, there it is neither valid ^{of remiss}
nor void, but only voidable at election.³ ^{in tail.}

Taking then this division for our guide, it will appear
that the issue in tail shall avoid only such dispositions
made by his ancestor as are or may be to his disadvantage,
and that such as are apparently beneficial will be binding
upon him.⁴

Therefore if tenant in tail grants a rent-charge to him
who has right of entry on the land, for a release of his
right⁵, or to a disseesee of the land for a release from him
of his right⁶, this grant shall bind the issue, because for
his benefit.

And if tenant in tail assigns a rent out of the land to a
woman who is entitled to dower thereof, not exceeding the
yearly value of her dower, and dies, this assignment shall
bind the issue.⁷ ^{Assignment of rent in lieu of dower.}

And if tenant in tail creates a charge upon the entailed
property for the purpose of preserving it from the breach
of a condition, such charge will be binding upon the issue.⁸ ^{Charge in performance of condition.}

As where land was devised to A. and his heirs, upon
condition that he granted an annual rent thereout to B. in
fee, and that if A. died without issue, the land should re-
main to B. in tail; and A. afterwards granted the rent
accordingly, and died; it was held that the grant should
bind the issue, because it was not against the will of the
testator, but agreeable thereto, and was granted for the
preservation of the estate; for if it had not been done, the

³ Arg. in *Syndicate v. Cudmores*, 1 Show. 374.

10. *Ibid.* 373. *Ottaway Lumber Co.* cited. 2 Brownl. 67. Co. Lit. 343b.

⁴ *Plow. Com.* 14 b. in *Maxell's ca.* *Ibid.* 436. in *Smith v. Stapleton.* Plg. Recov. 24.

⁵ *Bro. Ab. tit. Tail,* pl. 37. 1 Rol. Ab. 842. 1 And. 288. pl. 296.

⁶ *Bro. Ab. tit. Charge,* pl. 4. tit. Tail, pl. 6. 37. *Fitz. Ab. tit. Charge,* pl. 7. 1 Co. Rep. 94b, 96b. and

⁷ *Bickley v. Bickley,* 1 And. 287, 288.

CHAP. III.
Sect. 1.
*As to the
 dispositions
 of tenants
 in tail.*

**Estates de-
 rived from
 instrument
 creating
 entail.**

Partition.

**Charge and
 subsequent
 recovery.**

**Conse-
 quence of
 fraud.**

condition would have been broken ; and the donee did not make the grant by force of his interest, but also by force of an authority given by the devisor. *

And if A. devises to B. in tail, the reversion to C. in fee, upon condition that B. shall grant a rent-charge to D. in fee ; this is a good rent-charge, and shall bind him in the remainder after the tail determined. *

Estates also, which derive their existence from the execution of powers contained in deeds and wills whereby creation is given to entails, will be binding upon the issues in tail.

A partition of lands entailed between parcelers, if it be equal at the time of the partition, shall also bind the issues in tail for ever, albeit the one do alien her part. * And in *Thomas v. Gyles* ^y, two cases are mentioned as having been cited, wherein a partition between tenants in tail, though but by parol, had been decreed to bind the issue.

If a tenant in tail effects any charge upon the estate, although the same is defeasible by the issue, yet if the ancestor afterwards suffers a recovery of the estate, the charge will be thereby made good. *

In case a tenant in tail is prevented from suffering a recovery by the fraudulent conduct of the person entitled in remainder, things will be viewed in the same light as if a recovery had been actually suffered.

Therefore where A., tenant in tail, meant to suffer a recovery, and B., who had married the tenant in tail in remainder, did by force and management prevent A. from signing the deed to make the tenant to the praecipe ; Lord Thurlow's opinion was clear, that though at law B.'s wife was tenant in tail, and no party to the transaction, yet neither B. nor any one else could have the benefit of that fraud : and the jury upon an issue directed having found

* *Dutton v. Engram*, Cro. Jac. 427. *Gouldwell's ca. Poph.* 131. 5 Mod. 267. 1 Rol. Ab. 842.

** *Noy*, 80. in *Daniel v. Upton*. 1 Rol. Ab. sup.

z Co. Lit. 173 b.

y 2 Vern. 234. viz. *Burton v. Jeux, and Rose v. Rose.*

z See 1 Atk. 9. in *Stapilton v. Stapilton*.

that the recovery was fraudulently prevented, his Lordship held, even in favor of a volunteer, that the tenant in tail should not take advantage of the iniquitous act, though she was not a party to it: and the estate was considered exactly as if a recovery had been suffered.^a

CHAR. III.
Sect. I.
*As to the
dispositions
of tenants
in tail.*

And where a father by his will charged lands, which proved to have been previously entailed, with an annuity in favor of a younger son; and on a purchaser of the annuity making inquiries respecting the title to the same, the issue in tail encouraged him to proceed in his purchase, at the same time informing him he had heard of a settlement, the issue was deemed to confirm the annuity, though not having then seen the settlement, for that it was a negligent thing of him not to inform himself of his own title, that so he might have informed the purchaser of it when he came to inquire of him.^b

II. What dispositions made by tenants in tail are voidable, and capable of being either avoided or affirmed by the issue at election.

What dis-
positions
are void-
able.

As to cases falling under this head the rule has been already stated to be, that where the act of the ancestor is indifferent, and doubtful whether it will be of profit or loss, there it is neither valid nor void, but only voidable at election.

*Alienations
to com-
mence dur-
ing life of
tenant in
tail.*

But the more striking difference applicable to the alienations of a tenant in tail, in respect to their voidable or void property as regards the issue, exists between those alienations which may possibly commence during the life of the tenant in tail, and those which cannot commence until after his death; the former being voidable only, and therefore capable of being avoided or affirmed at the election of the issue, whilst the latter are absolutely void on their creation as against the issue, and consequently incapable of being confirmed by him.^c

^a Luttrell v. Olmius, cited 11 Ves. 658, 659. in Mestaer v. Gillespie. ^b Hobbs v. Norton, 1 Vern. 136. ^c Supra, page 79. See 7 Mod. 26. in Machil v. Clerk.

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Sect. I.
As to the
dispositions
of tenants
in tail.

Bargain
and sale,
&c.

Discon-
tinuance.

In order therefore that the alienation of the ancestor should be voidable only, it is essential that there exists a possibility of its taking effect during his life. And here it may be premised, that previously to the statute de donis^a, a tenant in tail had in him an estate of inheritance, termed a conditional fee; that statute made no alteration in the estate by taking away this inheritable property, but only fixed it, so that there should be no alienation of it to the disinheritance of the issue in tail, and secured the reversion to the donor, when the issue failed.^b The consequence therefore of the tenant's having the inheritance in him is, that if he conveys by bargain and sale, lease and release^c, covenant to stand seized, or any conveyance operating by way of grant^d, the bargainer, releases, or covenantee, acquires a base fee, which does not determine by the death of tenant in tail, but continues until the issue in tail makes an actual entry^e, or brings his action to avoid it; for these modes of conveyance do not deprive the issue of his entry, since they do not operate as a discontinuance. This base or determinable fee however will endure only so long as there is a continuance of issue under the entail, supposing it not to have been previously defeated by such issue.^f

But if the tenant in tail aliens by such conveyances as are calculated to effect, and in such a manner as to work, a discontinuance, then the issue is precluded from his entry, and driven to his real action.^g In any of the above cases however he may at his election affirm the ancestor's conveyance.

Dispositions made by tenants in tail are, of course, binding upon themselves, and, generally speaking, are good as against all others except the issue in tail, and

^a 13 Ed. I. e. 1.

^b Co. Lit. 326b. n. (1). 327 a. n. (2). [17th ed.] 7 Mod. 23. 25. in Machil v. Clerk.

^c Goodright v. Mead and Shilson, 3 Barr. 1703. Doe v. Rivers, 7 T. R. 276.

^d Co. Lit. 381 a. n. (1). [17th ed.]

^e An actual entry is now only necessary in order to avoid a fine.

^f Ex parte Boehm, 5 Mad. 156.

^g Co. Lit. 325 a.

those in remainder and reversion¹, they alone being aided by the statute de donis.²

By way then of exemplifying the present inquiry it may be stated, that if tenant in tail exchanges land, and dies, it is competent to the issue either to avoid or affirm the exchange at his election; if he enters on the land received by his ancestor in exchange, he is bound thereby during his life; but his election will not be conclusive upon his issue, for upon the second ancestor's decease, his issue may exercise the same election, and so on toties quoties.³ And although assets of greater value descend to the issue than the land in tail, yet he may choose to have the land conveyed away in exchange, or the land received in exchange at his election.⁴ And in the above case, a base fee passes to the exchangee, to be determined by the act of the issue in tail.

And if tenant in tail covenants to stand seised to the use of J. S., who is of his blood, for his life, with remainder over to another, and dies before the remainder happens; the remainder is good till avoided by actual entry of the issue, because the estate for life had taken effect; and the remainder might have taken effect during the life of the tenant in tail.⁵

And if tenant in tail makes a lease and release to the use of himself for life, with remainder over to another; the remainder is good till avoided, because it arises out of the estate of the releasee, which estate would have been good till avoided by the entry of the issue in tail.⁶

And a lease granted by tenant in tail of copyhold property with the lord's licence will be voidable by the issue in tail.⁷

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*As to the
dispositions
of tenants
in tail.*
Exchange.

Covenant
to stand
seised.

Lease and
release.

Copyhold
lease.

¹ Bridg. 28. in Crocker v. Kelsey. seen, pl. 20. Shep. To. 299. [7th ed.] Co. Lit. 51 a.

² 13 Ed. 1. c. 1.

³ 7 Mod. 25. in Machil v. Clerk; and see Bro. Ab. tit. Waiver des choses, pl. 14. tit. Formedon, pl. 40. tit. Exchange, pl. 15. tit. Agreement, &c. pl. 11. tit. Assets per di-

⁴ 1 Co. Rep. 96 b.

⁵ 7 Mod. 27, 28.

⁶ 7 Mod. sup. Lord Raym. 782.

⁷ Kitch. 166.

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*As to the
dispositions
of tenants
in tail.*

Grant.

Election as
to grant
when de-
termined.

If tenant in tail grants an advowson, common, tithes, rent in esse, remainder, or reversion, or other thing lying in grant, to another in fee, the grant is not absolutely determined by his death, but the issue in tail may make the grant void, or only voidable, at his election; for he may by entry or claim make it void, since such inheritances as lie in grant cannot by grant be discontinued, or he may avoid it by formeden.¹ If he brings a formeden for the rent, &c., he makes the grant voidable; but if he distrains for the rent, or claims it on the land, he thereby determines his election to make it void; but until he makes his election, the grant is not determined, for then it would prevent his election.²

And when tenant in tail grants a rent, reversion, common, &c., in fee, the grantee hath an indefeasible estate during the life of tenant in tail, and after the death of tenant in tail it is defeasible at the election of the issue; for if he comes on the land and distrains, or by claim on the land determines his election, then it is void on the death of tenant in tail; for otherwise the warranty in such case would make a discontinuance.³

And when tenant in tail of a rent, reversion, &c., grants it in fee with warranty, and dies; if the issue in tail determines his election to have it void, it is absolutely determined by his death, and by consequence the warranty also; but if the issue brings a formeden, and determines his election to make the estate have continuance, and not to be determined by the death of tenant in tail, then the estate doth continue, and by consequence the warranty doth remain, and if assets descend, the issue shall be barred. And there is no difference between a grant of tenant in tail of a rent, advowson, common, tithes, &c., in possession, and a grant of tenant in tail of a remainder or

No differ-
ence be-
tween grant
in posse-
sion and in
reversion.

¹ Co. Lit. 327 b. 3 Co. Rep. 84 a,
b. in ca. of fines. 7 Mod. 24.

² 3 Co. Rep. 84 a, b.

³ 3 Co. Rep. 85 a.

⁴ For the present state of the
law respecting warranty, see Co.
Lit. 373 b. n. (2). [17th ed.]

reversion expectant on an estate for life; for although in the first case the issue may have his formedon presently by the death of the tenant in tail, and in the other case, not till after the death of the tenant for life, yet it is all one, for by the death of the tenant in tail, the grant is not determined till election made by the issue in tail, for after the death of the tenant for life, he may bring a formedon if he will.^w

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of tenants
in tail.*

And if tenant in tail of a rent service, reversion, or remainder, grant the same in fee with warranty, and leave assets in fee simple, and die; this is neither bar nor discontinuance to the issue in tail, but he may distrain for the rent or service, or enter into the land after the decease of tenant for life. But if the issue bring a formedon in the descender, and admit himself out of possession, then he shall be barred by the warranty and assets.^x

But a distinction exists between the grant by a tenant in tail of the thing itself entailed, and the grant of a thing out of the thing entailed, as of a rent; the former, as we have seen, is voidable only, and therefore capable of being either avoided or made good at the election of the issue; while the latter is absolutely void upon the death of the grantor, and not capable of being afterwards made good.^y Some cases however there are, as we have already seen^z, wherein the grant by a tenant in tail of something out of the thing entailed will be binding upon the issue.

Difference
between
grant of
thing en-
tailed, and
out of thing
entailed.

It has indeed been said, that if tenant in tail grant to another all the entailed property in fee, he to whom the alienation is made hath no other estate therein but for the life of tenant in tail.^a But this passage must be taken in a qualified sense, and be construed to mean that the estate of the grantee is indefeasible for no longer a period than the life of the tenant in tail, and not that it becomes ipso facto void upon his death.^b And the above authority was

^w 3 Co. Rep. 85a.

^a See supra, page 79.

^x Co. Lit. 332 b. 3 Co. Rep. 85a.

^b Lit. s. 613.

^y Arg. 1 Bulst. 32. in Walter v. Bould.

^c Co. Lit. 331 a. n. (1). [17th ed.]

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As to the dispositions of tenant's in tail.

What dis-
positions of
tenant in
tail equity
will not en-
force upon
issue.

noticed by Holt C. J. in *Machil v. Clerk*^c, who said, that when tenant in tail bargained and sold, leased and released, or covenanted to stand seized to uses in fee, such conveyances should pass a base fee, which should continue till determined by the act of the issue in tail.

Though it seemed formerly to be a doubtful point how far courts of equity would interfere in enforcing upon the issue the performance of the dispositions made by the ancestor tenant in tail, since Finch C. is reported to have said, in a case where he relieved the issue against a voluntary devise made by his father tenant in tail, that he would never help the issue against a purchaser^d; yet the rule now appears to be, that unless the tenant in tail has had recourse to one or other of those modes of assurance by which it is competent to him to bind his issue, a court of equity will not deprive the issue of the right which he derives from the author of the entail, by compelling his submission to the dispositions of his ancestor.^e

And the better opinion seems to be, that the same rule would be applicable as well where the ancestor was only equitable tenant in tail, as where he was legal tenant, since the same rules and solemnities are as requisite to barring the former as the latter estate.^f

What dis-
positions
are void.

III. What dispositions made by tenants in tail are absolutely void as regards the issue, and incapable of being affirmed.

This head of inquiry may be introduced by observing, that where the act of the ancestor is apparently mischievous to the issue, it becomes absolutely void by his death.^g

Grant out
of thing
entailed.

We have seen that, subject to some excepted cases above noticed, the grant of a thing out of a thing entailed is ab-

^c 7 Mod. 25. which overruled *Took v. Glascock*, 1 Saund. 260.

^d 2 Ch. Ca. 4 Mich. 32. C. 2. Anon.

^e *Powel v. Powel*, Prec. Ch. 278. *Cavendish v. Worley*, Hob. 203. *Herbert and Fream*, 2 Eq. Ca. Ab. 28. pl. 34. *Ross v. Ross*, 1 Ch. Ca.

^f 171. 2 Ves. 634, in *Hinton v. Hinton*.

^g See Sug. V. & P. 177, 178. [5th ed.] and the authorities there referred to.

^h Arg. in *Symonds v. Cudmore*, 1 Show. 574.

solutely void upon the grantor's death, and incapable of subsequent confirmation.^b

And if tenant in tail grant estovers to another, or the vesture of his woods, these grants determine with his death. And if he acknowledges a recognizance or statute whereupon the land is extended, the issue may oust the cursees after the death of the ancestor.^c So if tenant in tail grant a rent de novo out of land, such grant will continue no longer than during his life.^d

If tenant in tail of a manor, to which an advowson is appendant, grants the next avoidance of the advowson, and dies, and the issue enters upon the manor, the grant is void, because this is but a chattel, and no rent is reserved upon it, and it is a thing which lies in grant, whereof no fernardon lies.^e

And upon demurrer in quare impedit, where tenant in tail granted an advowson to the use of himself and wife, and his heirs male, and died, and the wife survived and married a second husband; the estate was held to be determined by the death of the tenant in tail.^f

If the disposition of the tenant in tail cannot by any possibility take effect during his life, it will be void in its very creation as against the issue, and not voidable only.

Upon this principle the case of *Machil v. Clerk*^g received its adjudication, on which occasion the doctrine applicable to the voidable dispositions of tenants in tail was very fully gone into. The case was as follows: — a tenant in tail, in consideration of the marriage of his son, covenanted to stand seised to the use of himself for life, remainder to the use of his son, and the heirs male of his body by his intended wife, with remainders over; and afterwards suffered a recovery, in which he himself was tenant to the preceipe, and vouched over the common vouchee, and which re-

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Sect. I.

As to the
dispositions
of tenants
in tail.

Grant of
estovers,
&c.

Recogni-
zance, &c.

Grant of
rent de
novo.

Of next
avoidance
of advow-
son.

Disposition
not taking
effect dur-
ing life of
tenant in
tail.

^b Supra, page 85.

^c 1 Rol. Ab. 841, 842.

^d Co. Lit. 527b. 3 Co. Rep. 85b.

^e Bowles v. Walter, 1 Rol. Rep. 190. 1 Rol. Ab. 843.

^f Lord Say v. Bishop of Peter-
borough, 1 Brownl. 161.

^g 7 Mod. 18. 2 Salk. 619. Lord

Raym. 778. Comyns, 119; and see
Seymor's ca. 10 Co. Rep. 95 b.
96 a. 2 Co. Rep. 52a. Yelv. 51.

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*As to the
dispositions
of tenants
in tail.*

covery was to other uses than those mentioned by the covenant; and the uses on the recovery were adjudged to be good. And Holt C. J. in delivering the judgment of the Court, and noticing that the bargainee, releasee, or the cestui-que-use in a covenant to stand seised of a tenant in tail had a base fee, observed, that the reason why the covenant to stand seised in the case in question did not alter the estate tail was, that though the tenant in tail might make a conveyance of the estate in his life which should be good until avoided by the issue, yet any conveyance he made to commence after his death should be void, if by possibility it might not take effect during his life; and that the estate by this covenant was to commence after the death of tenant in tail. And the C. J. argued, that the covenant by the tenant to stand seised to the use of himself was void, except it was for the sake of the remainder over; and that the remainder being to commence after his death was void, and the covenant to stand seised to his own use could not be good for the sake of a void thing:—that the estate limited to commence after the death of the tenant in tail was void, because it was to commence at a time when the right of the estate out of which it would issue was in another person by a title paramount the conveyance, namely, per formam doni; and that the issue in tail had a title paramount the title of the remainder by virtue of the covenant, the very minute the remainder would take effect; and therefore to make such an estate tail take effect upon the possession of the issue, whose title was paramount, would be to make an estate take effect by wrong the very minute it had its creation.

And where tenant in tail covenanted to stand seised to the use of himself for life, remainder to the use of his eldest son in fee; and afterwards covenanted to levy a fine to the use of a stranger in fee, which he levied accordingly, and died; on the question whether the son should have the land by the first covenant strengthened by the fine, it was resolved in the negative; for that when tenant in tail covenanted to stand seised to the use of himself for life, it was

as much as he could lawfully do, and the limitation over was void, and he remained seised as before.ⁿ

IV. The commission of what acts by the issue in tail does and does not preclude an election to avoid or affirm the voidable dispositions of the ancestor tenant in tail.

This inquiry is applicable only to such dispositions made by the ancestor tenant in tail as fall under the second division above considered, namely, those that are voidable; for where the disposition of the ancestor absolutely determines with his death, it cannot be confirmed by the issue on his committing such acts as would have precluded his election had the ancestor's disposition been voidable only upon his death. So that if tenant in tail grants a rent-charge, and dies, and the issue pays the rent, this shall not bind him, for the grant of the tenant in tail is determined by his death, and a thing determined is void, and a thing void or determined cannot be made good by payment, but must have a new creation.^o

And where tenant in tail granted a rent-charge, and died, and the issue entered and enfeoffed another, and took back an estate; on assize brought for the rent, the land it seems was considered to be discharged.^p

And where the ancestor discontinues the estate, and takes back an estate tail from the discontinueree, rendering rent to him; the payment of this rent by the issue will not be conclusive upon him, for he was remitted before, and thereby the rent was determined.

But where the issue accepts rent reserved upon his ancestor's discontinuance, there it seems he will be bound; for it is said, that if tenant in tail makes a feoffment rendering rent, and dies, and the issue accepts the rent, he cannot during his life have a formedon.

And if tenant in tail be of one acre of land, and he exchange the same acre for another acre with a stranger in fee, and the exchange is executed, and the tenant in tail

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dispositions
of tenants
in tail.*

Election
upon void-
able dis-
positions
by what
acts deter-
mined.

Remitter.

Acceptance
of rent
upon dis-
continu-
ance.

Entry on
exchange.

ⁿ Bedingfield's ca. Cro. El. 895.

² Co. Rep. 52 a.

^o Bro. Ab. tit. Barre, pl. 27.

^p Bro. Ab. tit. Charge, pl. 20; and see Plow. Com. 437. in Smith

v. Stapleton.

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dies, and his issue enters into the land taken in exchange by his father; he hath perfected the exchange during his life.⁴

So if tenant in tail exchange for land of less value, if the issue once agrees to it after his death, he shall never avoid it, as if he enters into the land or the like. But if the issue does not enter nor agree to the land taken in exchange, which was with warranty, and brings his action, he will not be barred, for the land taken in exchange is not assets unless he enter upon it, and his bringing an action is a disagreement by matter of record.⁵

*Copyhold
lease when
unavoid-
able.*

If a copyholder of an estate tail lets the same for years by the lord's licence, and dies, and his issue surrenders to A. and his heirs; neither the issue nor A. can enter and defeat the lease.⁶

*Adoption
of agree-
ment.*

Though the issue is not bound by his ancestor's agreement⁷, yet if he accepts and adopts the same, he will be bound by it.

As where A., having copyhold lands by descent, agreed to exchange the same with B., who was seised of lands in tail; and the agreement being executed, A. obtained a decree against B. to levy a fine of his estate tail; and on B.'s death in contempt for not obeying the decree, his issue entered on the copyhold lands, and continued in the enjoyment of the same; it was held that the issue, by accepting the agreement, had made the same his own, and was bound by it.⁸

Several other acts committed by the issue, which will have the effect of determining his election one way or the other, are easily deducible from preceding analogous inquiries, and will readily present themselves to the mind of the reader.

⁴ Perk. s. 294.

⁵ Bro. Ab. tit. Exchange, pl. 15.

⁶ Kitch. 166.

⁷ See supra, page 86.

⁸ Ross v. Ross, 1 Ch. Ca. 171.

SECTION 2.

Election considered in application to leases made by tenants in tail, not warranted by the statute of 32. H. 8. c. 28.

A lease for years made by tenant in tail after the passing of the statute "de donis" was not absolutely binding for a longer period than his own life; but upon his death, the same did not, in consequence of the extent of his interest in the entailed property, become absolutely void as against the issue in tail, but voidable only, and it was therefore in the election of the issue either to avoid the lease in toto, or to convert its voidable character into a conclusive and indefeasible one. With respect however to those in remainder and reversion, such lease, unless it had its creation in a mode whereby a discontinuance was effected, necessarily determined on the death and failure of issue of the tenant in tail.^{*}

The statute of 32. H. 8. c. 28. in effect enacted, that all leases made by persons having any estate of inheritance in fee-tail, for a period not exceeding three lives or twenty-one years, and possessing the several other requisites therein specified, should be binding upon themselves and their issue in tail.[†]

If then a lease be made by a tenant in tail at the present day not conformable to the above statute, it is exposed to the same disability of being defeated by the issue in tail as attended leases made prior to the statute, and is consequently void or voidable at the election of the issue. And though no rent be reserved upon such a lease the same is

What leases
are void-
able.

* 13 Ed. I. c. 1.

Machil v. Clerk. 1 P. Wms. 144.

Woodroff v. Greenwood, Noy, 56. 4 Bac. Ab. 18. Bro. Ab. tit. Accept. pl. 39. 3 Bl. Com. 318. Bridg. 28. Lord Raym. 780. Dy. 46. pl. 9. 239. pl. 42. 7 Mod. 25. in

in Bale v. Colman. Shep. To. 268. [7th ed.]

† Leases by tenants in tail of copyhold lands are not within this statute. See Cro. Car. 44.

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*As to the
voidable
leases of
tenants in
tail.*

Difference
between
leases of
things ly-
ing in livery
and in
grant; and
as to the
latter, be-
tween
leases for a
freehold
and chattel
interest.

voidable only, and not void, because the issue may affirm it by acceptance of fealty.^a

But authorities are to be met with which induce the conclusion, that leases made by tenants in tail, and not warranted by the statute of 32. H. 8., are not all of them voidable by the issue upon the ancestor's death, but that some become absolutely void upon that event, and incapable of being kept on foot by the issue. And herein a distinction it seems must be taken between leases of things lying in livery, and of things lying in grant; and as to the latter, between leases made thereof for a freehold interest, and those made for a chattel interest. And first, with respect to things lying in livery, it appears that all such leases made thereof as are not sustainable under the statute are voidable only upon the death of the tenant in tail, and consequently form a subject of election to the issue. Secondly, with respect to things lying in grant, the opinion deducible from the books seems to be, that if tenant in tail makes a freehold lease thereof, the same will not upon his death be sustainable either by the common or statute law, but will be void as against the issue, and incapable of being made good by acceptance of rent or other confirmatory act; void by the common law, because out of things incorporeal no rent can be reserved^b; and on a freehold lease no action of debt will lie^c; void under the statute law, because the 32. H. 8. extends only to hereditaments whereout a rent may be reserved, and the statute of 5. G. 3. c. 17., by which an action of debt for the recovery of rent is provided, applies solely to freehold leases made by ecclesiastical persons.^d But thirdly, if tenant in tail makes

^a 4 Bac. Ab. 24.

^b But rent may be reserved by the king out of incorporeal hereditaments. See Co. Lit. 47 a. n. (1). [17th ed.]

^c Co. Lit. 44 b. 47 a. and n. (4). ibid. [17th ed.] Hawk. Ab. Co. Lit. 73.

^d But if the stat. of 8 Ann. c. 14. s. 4. be held to extend to leases

for lives of incorporeal hereditaments, about which there seems to exist a doubt, then such leases might perhaps be held voidable only. It seems to be considered that the statute has enabled lay proprietors to make leases of their tithes for life, and to bring debt for the rent. See 2 Saund. 305 a. in n. (12). [4th ed.]

a lease for a chattel interest of things lying in grant, it appears that the same will not be void upon his death as against the issue, but voidable only; for although no distress can be made for any rent that may be reserved thereon, yet an action of debt will lie, and so the lessee is not without remedy.^c

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As to the
voidable
leases of
tenants in
tail.*

Such further observations therefore as are about to be submitted are applicable to those leases only made by tenants in tail, which upon their deaths assume a voidable character with respect to the issue. These observations will be as follows:

I. Where an election does and does not arise to the issue in tail to avoid leases made by the ancestor tenant in tail, not warranted by the statute of 32 H. 8., and as to the nature of the election.

II. The commission of what acts by the issue in tail does and does not preclude an election to avoid leases made by the ancestor tenant in tail, not warranted by the statute.

Though it be clear that a lease made by tenant in tail to commence after his death is void ab initio^d, yet if a lease be made by tenant in tail to commence in futuro^e, and which may possibly commence during his life, and he dies before its commencement, though such lease is said to be merely void against the issue, yet it is capable of being made good at his election by acceptance of rent, or by disclaiming and avowry, or other acts which amount to an admission of the lease, and estop and preclude him from disaffirming it.^f As if tenant in tail leaseth for years to commence at Michaelmas next following, rendering rent, and dies before Michaelmas, and the issue enters into the residue of the land descended; yet he may make this lease

*Lease to
commence
after death
of tenant in
tail void.
If it may
commence
during his
life, void-
able by
issue.*

^a Shep. To. 278. [7th ed.] 4 Bac. Ab. 70, 71.

^b 7 Mod. 26. in Machil v. Clerk.

^c See 3rd resol. in Symonds v. Cudmore, Carth. 258.; and see supra, pa. 87.

^d Salk. 620. in same ca. Dy. 279., in pl. (7).

^e Symonds v. Cudmore, supra.

^f 1 Rol. Ab. 843.

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leases of
tenants in
tail.*

Election to
avoid lease
commenc-
ing in pre-
senti not
transfe-
rable by
act of party.

good by acceptance of rent after Michaelmas, because his election was not come before.^a

And it was said by Holt C. J. in delivering the opinion of the Court in *Mackil v. Clerk*^b, that if tenant in tail makes a future lease for years, which by possibility may commence during the life of tenant in tail, it is not void, but voidable as to the issue.

The power of disaffirming the voidable leases of tenants in tail commencing in presenti cannot it appears be exercised by the alienees of the issue in tail, in consequence of the right of election not being transferable by act of the party.

If therefore a tenant in tail makes a voidable lease for life or years, and dies, and the issue aliens the land by fine before affirmation or disaffirmation of the lease by acceptance or entry; the donee cannot avoid such lease, because the same being voidable only by entry, the fine operates to destroy the right of entry; and the power which the issue had of avoiding the lease is not communicated to the donee by the fine, since it cannot be transferred to a stranger any more than a right of action.^c

So if the tenant in tail himself after such lease had levied a fine to the reversioner, the latter could not have avoided the lease so long as the issue in tail continued, by reason of the right of entry not being capable of transmission.^d

And where tenant in tail before the statute of uses made a feoffment to the use of himself in fee, and he and his feoffees made a lease for years, rendering rent, and afterwards the statute was made, and the tenant in tail died seized, and his issue aliened the land by fine before entry.

^a 5 Danv. Ab. 197. 1 Show. 384. pl. 5. Hutt. 84. 2 Rol. Rep. 490.

^b 2 Salk. 620. 498. 1 Show. 376.

^c 1 Rol. Rep. 403. 5 Leon. 154. 1 W. Jo. 62.; and see 1 Rol. Ab. Cadee and Oliver's ca. 4 Mod. 5. 843. W. Jo. 60. Hutt. 84. Cro. in Symonds v. Cudmore. Croker Jac. 688. 3 Danv. Ab. 197. Cudmore v. Betison, Sid. 62. 4 Bac. n. (2). [17th ed.] Cro. Jac. 688. Ab. 35.

made upon the termor, or any receipt of rent, and the alienee accepted the rent; on the question whether the alienee could afterwards avoid the lease, the better opinion was that he should never avoid it, whether he had received the rent or not.^k

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Sect. 2.
*As to the
voidable
leases of
tenants in
tail.*

And if there be lessee for life, remainder to B. in tail, who leases to C. for years, to commence after the death of tenant for life, and then suffers a common recovery to D., and dies: the lease for years is good against D.¹

But though the power of election to avoid a lease in praesenti cannot be transferred by act of the party; yet it seems that the power of election to avoid a lease made to commence in futuro is capable of being so transferred.

Contra if commenc- ing in future.

Thus it is said, if tenant in tail makes a lease for forty years, to commence ten years after, reserving rent, and dies, and the issue enters and enfeoffs A., and on the expiration of the ten years the lessee enters; if A. accepts the rent, the lease is good, for he shall have the same election that the issue in tail had, either to make it good or avoid it; and it could not be known whether the issue by his entry avoided the lease.^m

And where a man, seised in fee, made a lease for ninety-nine years if three persons so long lived, then settled the reversion upon himself in tail, with power to make leases for twenty-one years, and then made such a lease and died; and the son, who was the issue in tail, levied a fine, and sold the reversion: it is said that it seemed to the Court that on the determination of the first lease the cousee might avoid the second lease, because it was never in the election of the tenant in tail or of his issue to avoid it, they having conveyed away their estates before the second lease was to commence: and a difference was taken between a voidable lease by tenant in tail to commence in praesenti, and a lease to commence at a day to come; for

¹ Dy. 51, pl. 17. 2 Bulst. 44. ² Co. Lit. 46 b, Plow. Com. 457.
⁴ Rec. Ab. 90. Bridg. 97. in eq. of Dy. 51, in par. pl. 17. 1 Rol. Ab.
Crocker v. Kelsey. 831. 842.

¹ Dy. 51 b. in mar. cited from Noy's lect.

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voidable
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tenants in
tail.*

that if tenant in tail made a lease to commence in presenti, and conveyed away his estate by fine, the conusee must hold it charged with such lease; but that if it were to commence in futuro, it was otherwise, because it could not be avoided before the commencement.^a

It is stated indeed to have been the opinion of three justices in the case of *Symonds v. Cudmore*^b, that the power to avoid or affirm leases was personal to the issue in tail, and could not be transferred. But upon this point Holt C.J. was against them, and the determination of it seems not to have been necessary to the decision of the case.

Effect of
election
where suc-
cession of
claimants.

Where there is a succession of claimants, it seems that the election of the one first coming in to avoid or confirm a voidable lease will not conclude the election of those coming in after.

Thus if a tenant in tail under coverture makes a lease voidable by the issue, and dies, and his widow is afterwards endowed of the land demised; although she may avoid the lease during her tenancy, yet the issue in tail may at his election either restore its existence after her death by acceptance of rent and waiver of the possession, or may continue the avoidance of it.^c

But if tenant in tail make a voidable lease, and afterwards take wife, and die without issue, leaving his wife with child of a son, and the wife afterwards recover dower of the same land; she before the son's birth shall not avoid the lease, for her estate is quodammodo a continuance of part of the estate tail.^d

And if tenant in tail leases for years reserving rent, and

^a *Opee v. Thomasius*, Sid. 260. But the statement of the case is from that given by Dolben J. in 4 Mod. 6., and where he says that no judgment was given; and Keyling is reported to have said, that the conusee should have advantage of election as well as the issue; and see 1 Keb. 778. Sir Thomas Raym. 132. 3 Danv. Ab. 195.

^b *Carth.* 257. 4 Mod. 1. Plow. Com. 436. Skin. 284. 311. 328. 1 Show. 570. Holt, 666. Salk. 338. pl. 3. 1 Freem. 503. 3 Danv. Ab. 196.

^c 7 Co. Rep. 8b.

^d 7 Co. Rep. 9a. Bridg. 28. So it is said, that a lease by tenant in tail avoided by the issue will be revived against tenant in dower. See Co. Lit. 51 a. n. (2). [17th ed.]

afterwards takes wife, and dies without issue; as to him in the reversion the lease is merely void; but if he endows the wife of the tenant in tail of the land, as to her she is in of the estate of her baron, and the lease is revived.^r

Again, if tenant in tail makes a lease for years, voidable by the issue, and dies without issue, but leaving his wife enceinte of a son, and the donor enters and avoids the lease, and after the birth of the son the lessee re-enters; the issue at full age may by acceptance of rent affirm, or at his election avoid the lease.^s

And where a tenant in tail made leases of certain houses, which leases were voidable by the issue in tail; it was resolved, that though the king in right of wardship should have avoided the leases, yet his avoidance did not invalidate the leases so absolutely that the heirs in tail, after the king's interest determined, could not make them good by acceptance of the rent. And when voidable leases being void for a time should be always avoided, and when not, this difference was taken, namely, when the interest of him who made the avoidance was but for part of the term, so that it appeared a residue remained; and when he who made the avoidance avoided the whole interest, so that it appeared no residue could remain; and in the principal case it appeared, that after the king's interest determined, there remained a residue of the term.^t

If a woman tenant in tail makes a voidable lease for years, and afterwards marries and has issue, and then dies; the issue cannot avoid the lease during the life of the husband, he being tenant by the courtesy.

As where a woman tenant in tail made a lease for years, and after took husband, and they had issue, and then the wife died; it was resolved that the issue could not avoid this lease during the life of the husband, because he was tenant by the courtesy of the freehold and reversion expectant thereupon: and that though the husband should

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voidable
leases of
tenants in
tail.*

When void-
able leases
always
avoided,
when not.

Lease un-
avoidable
during te-
nancy by
courtesy.

^r Co. Lit. 46 a.

^t Earl of Bedford's ca. 7 Co.

^s 7 Co. Rep. 8 b. Co. Lit. 46 a. Rep. 7 b.
Godb. 325.

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*As to the
 voidable
 leases of
 tenants in
 tail.*

Notwith-
 standing
 surrender
 of that te-
 nancy.

Election
 upon void-
 able leases
 by what
 acts deter-
 mined.

Acceptance
 of rent.

surrender his estate by the courtesy to the issue, yet the same would not help the issue to avoid the lease till the husband's death, because his estate as tenant by the courtesy was a continuance of his wife's estate, and so long as that lasted, the issue's time for avoiding the lease was not come; and that notwithstanding the surrender, yet as to the lessee who was a stranger, the estate by the courtesy had still an existence and continuance as if no surrender had been made, for that he, being a stranger, should not suffer by such voluntary act of the tenant by the courtesy.⁴

And where a woman tenant in tail made a lease for years not warranted by the statute, and afterwards took husband, had issue, and died; and the husband being tenant by the courtesy surrendered to the issue; it was held that the issue could not avoid the lease during the life of the tenant by the courtesy, for the tenant was in as a purchaser.⁵

II. The commission of what acts by the issue in tail does and does not preclude an election to avoid leases made by the ancestor tenant in tail, not warranted by the statute.

In addition to what may be collected upon this subject from the inquiry we have just been making, it may be added, that if tenant in tail makes a lease for twenty years⁶, and dies, and the issue accepts rent from the lessee; this amounts to a confirmation of the lease, and precludes his election to avoid the same. And if in this case the lessee had assigned over five acres of the leased land to another for the residue of the twenty years, and the issue had accepted rent from the assignee, this would also have amounted to a confirmation of the entire lease, because the assignee as to the five acres stood in the place of the lessee.⁷

* Dy. 46 b. in mar. to pl. 9. 51 b. * 4 Leon. sup. Powtrel's ca. in mar. to pl. 17. 263. pl. 26. Co. Ow. 83.
 Lit. 338 b. 4 Leon. 200. pl. 321. * Or any other term. See Dal. 65. pl. 28. 4 Bac. Ab. 29. Bridg. 28.
 quære Mo. 8. pl. 30. is contra. * 4 Bac. Ab. 19, 20.; and see Butler and Baker's ca. 3 Leon. 271.

So if the issue in tail after the death of his ancestor aliens before entry or receipt of rent, the alienee has no power of avoiding the lease, because it was only voidable by the entry of the issue.

And where a tenant for life and the remainder man in tail made a lease for life, remainder for life; the acceptance of rent by the issue in tail from the lessee for life was held to be an affirmation as well of the first lease as of that in remainder.¹

And if a tenant in tail makes a voidable lease, and afterwards suffers a recovery, that lets in the lease and makes it good.²

As to the commission of what acts by the issue does not preclude an election to disaffirm the voidable leases of his ancestor; if tenant in tail makes a lease for twenty years, and the lessee makes a lease for ten years, and the tenant in tail dies, and the issue accepts rent from the under-lessee; this does not amount to a confirmation of the lease, because it was not obligatory on the under-lessee to pay his rent to the issue, and he is answerable for it over again to his immediate lessor; the acceptance therefore by the issue does not preclude him from his election to avoid or confirm the lease.³

And the acceptance of rent, which is not due to the acceptor, will not bind him.

As if land be given to husband and wife, and the heirs of the body of the husband, who makes a lease for years, and dies; the acceptance of rent by the issue in the wife's lifetime does not preclude him from avoiding the lease upon her death, for at the time of the acceptance no rent was due to him.⁴

So Lord Coke lays it down as his fifth rule upon the learning of estoppels, that a man shall not be concluded by acceptance or the like before the title accrued.⁵

¹ Geofries v. Coites, 1 Leon. 243. ² 4 Bac. Ab. 19, 20.
See 1 Atk. 9. ³ 3 Co. Rep. 64 b.
 ⁴ Co. Lit. 352 b.

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Sect. 2.
*As to the
voidable
leases of
tenants in
tail.*

*Alienation
before
entry.*

*Not by ac-
ceptance of
rent from
under-
lessee.*

*Nor accept-
ance of
rent not
due.*

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As to the
voidable
leases of
tenants in
tail.*

*Nor by ac-
ceptance of
rent and a
remitter.*

The acceptance of rent by the issue upon the ancestor's lease may be prevented having the effect of confirming the same, by reason of the doctrine of remitter.

Therefore where tenant in tail made a feoffment to the use of himself in fee, and after made a lease for years rendering rent, and died; the acceptance of rent by the issue was held not to confirm the lease, since he was remitted to the estate tail by descent; and the lease being created out of the fee acquired by the feoffment, the defeasance of that estate by the remitter involved in it the overthrow of the excrecent interest.^a

SECTION 3.

*Election considered in application to dispositions affecting the
property of feme-covert.*

The power which a husband acquires over the freehold and inheritance of the wife by marriage is of such a nature as to render the dispositions made by him solely, or them jointly, of that property, conclusive upon them during the coverture.

But upon the husband's death, these dispositions, if not effected by those means whereby it is competent to feme-covert to bind themselves, are for the most part voidable by the wife and her heirs, and consequently capable of being either avoided or affirmed at election.^c By the common law, if the conveyance of the wife's estate by the husband alone, or jointly with her, operated as a discontinuance, the wife and her heirs, upon the death of the husband, were disabled from resuming the property aliened by making an entry thereupon, and were for that purpose compelled to have recourse to a real action: the statute of 32. H. 8.^b gave an entry to the wife and her heirs in all

^a Mo. 846. pl. 1143. 4 Bac. Ab. ^b s. 6. explained by 34. & 35. 21. H. 8. c. 22.

^c 2 Rol. Ab. 346, 347.

cases where her freehold had been discontinued during the coverture, and by whatsoever means, excepting by fines levied by the husband and wife whereunto she was party and privy; and to which we may add recoveries duly suffered by them. And it is observable, that though the statute makes mention of a feoffment or other acts done by the husband only, yet a joint feoffment made by husband and wife of her freehold has been held to be within the meaning though not within the letter of the statute, being in substance the act of the husband only.⁵ And the statute has been held to extend to discontinuances alone.⁶

The inquiries upon the present subject may be as follows:

I. What dispositions made by husband and wife jointly, or by him solely, of her freehold or inheritance during the coverture, are voidable in respect to the wife and her heirs upon the determination of the coverture; and where an election arises to the wife and her heirs to avoid or affirm such dispositions.

II. The commission of what acts by the wife or her heirs does and does not preclude an exercise of such election.

III. Whether the dispositions made by the husband alone, or together with his wife, of her freehold or inheritance, be effected by those instruments which work a discontinuance, (excepting fines and recoveries duly levied and suffered,) or by those which transfer the possession only, and not the right of possession, the better opinion seems to be, that an election in either case arises to the wife and her heirs upon the determination of the coverture, either to avoid such dispositions by entering upon the property conveyed away, or to confirm and adopt them.

If then a husband and wife make a feoffment of her land rendering rent, and she after his death accept the rent, she will be bound by the feoffment.⁷

⁵ Co. Lit. 526a.

⁶ See 8 Co. Rep. 72 b. in Greenley's ca.

⁷ Bro. Ab. tit. Cui in vita, pl. 1.

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Sect. 5.
As to disposi-
tions of-
settling the
property of
femes-
covert.

What dis-
positions
are void-
able.

Feoffment
by husband
and wife.

CHAR. III.
Sect. 3.
*As to dispo-
sitions af-
fecting the
property of
femes-
covert.*

—
Exchange

Bargain
and sale,

And if a husband enfeoff a stranger of land whereof he is seised in right of his wife, and take back an estate to him and his wife and a third person in fee, and they three join in an exchange of the same land for other lands to a stranger in fee, and the exchange is executed, and she on her husband's death occupies the lands taken in exchange with the other third person; hereby the exchange is made good, since the wife was a grantor in the exchange.¹

So if husband and wife by indenture bargain and sell the land of the wife, rendering rent; it is a good deed of the wife, because she may afterwards accept the rent and make the deed good.²

Again it is said, that if a husband seised in right of his wife exchange lands, and by the exchange give a fee simple; this is good until it be avoided by the wife after the death of her husband.³ But Brooke says, that if husband and wife seised in her right make an exchange, and on the husband's death the wife agree to the exchange, she will be bound thereby; yet that it seems if the husband make an exchange without his wife, there she will not be bound by entry or agreement, any more than by acceptance of rent on the lease of the husband alone, for these are void against her where she is not a party, and voidable where she is.⁴

And in the Touchstone we find it said, that if husband and wife exchange the lands of the wife for other land, and she after her husband's death agrees to it, and enters upon the land taken in exchange; hereby the exchange is made good against her and her heirs: but that if the husband alone makes an exchange of his wife's land, and she after his death agrees to it, and enters into the land, it seems this will not make the exchange good.⁵

By the two latter of the foregoing authorities respecting an exchange of the wife's land, the same, if made by the

¹ Shep. To. 300. [7th ed.] Perk. s. 293.

² Cro. El. 769. pl. 12. in Skip-
with v. Steed.

³ Co. Lit. 51a. 1 Rol. Ab. 811.;
and see Perk. s. 279.

⁴ Bro. Ab. tit. Exchange, pl. 9.
⁵ Shep. To. 300. [7th ed.]

husband alone, seems to be treated as absolutely void as against the wife and her heirs upon the husband's death, and incapable of confirmation; while by those immediately preceding, it is treated as voidable only.

Now as to such things belonging to the wife as lie in grant we have Lord Coke's authority for showing, that although the wife is not made a party to the husband's disposition of them, (for so the passage seems to infer,) the same does not upon his or her decease become so absolutely void that it cannot be afterwards continued by her or heirs: for he says, that if a husband seised in right of his wife of a rent, or any thing which lies in grant, by deed grant it in fee, it is not absolutely determined by the death of the husband, for that the wife hath election to determine it and make it void, or by bringing of her writ to make it voidable, or by claim on the land to make it void: and that if a husband makes a lease for years, and releases to the lessee and his heirs, it is not absolutely determined by the death of the husband, but is void or voidable at the election of the wife.^o

With respect however to dispositions made by the husband of such property belonging to his wife as lies in grant, a difference seems to be taken between the grant by him of a thing *in esse* lying in grant, and the grant of a thing *de novo* out of her land: the former we have seen is voidable by the wife and her heirs; but as to the latter it is said, that if a husband grants a rent in fee out of his wife's land, it is absolutely void upon his death.^p

The conclusion deducible from the foregoing authorities upon the whole seems to be, that with respect to all such dispositions as are made of the freehold property of a feme during coverture, and to which both she and her husband are parties, an election may be exercised by the wife and her heirs upon the husband's death, either to avoid or affirm the same, (except such dispositions have been effected by those conveyances which are absolutely conclusive upon

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tions af-
flicting the
property of
feme-
covert.

Disposition
by husband
of things
lying in
grant.

So release
by him.

Grant by
husband of
thing de
novo void
upon his
death.

^o 3 Co. Rep. 85 b. 86 a. Co. Lit. ^p 3 Co. Rep. 85 b.
527 b.

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sitions af-
flicting the
property of
wives-
covert.

Disconti-
nuance by
husband
alone void-
able.

And, sem-
ble, other
dispositions
by him of
things in
livery.

Contract by
husband
voidable.

the wife and her heirs.) But as to those dispositions in which the wife is not joined as are made of things lying in livery, the authorities appear to be conflicting upon the point whether they become absolutely void upon the husband's death, or voidable only.

It at least seems clear, that whenever the disposition made by the husband alone operates as a discontinuance, the same will not so absolutely determine upon his own or his wife's death as to be incapable of confirmation by her or her heirs, but will be voidable only; and this seems fully proved by the circumstance of an entry to avoid such disposition being given by the statute, in substitution for the previous remedy by action. And that dispositions made by the husband alone of things lying in grant, if *in esse*, are voidable only, but if of things *de novo*, are absolutely void upon his death. The better opinion also seems to be, that all such dispositions of things lying in livery made by the husband alone as do not work a discontinuance are voidable only upon his death, and do not so absolutely determine upon that event as to be incapable of subsequent confirmation by the wife or her heirs, though the authorities are not as we have seen in unison upon the point.^a

If a husband contract for the sale of an estate whereof he is seised in right of his wife, and die, there seems to be no doubt but that the wife may, if she think proper, abandon the contract *in toto*.^b But no case has been met with in express determination of the question, whether she can compel the purchaser to perform the contract. The point was incidently touched upon in a recent case, but did not require a decision.^c It would seem however, from analogy to the cases wherein the wife may elect either to avoid or affirm the absolute dispositions made of her estate during the coverture, that a similar election may also be exercised by her in avoiding or affirming contracts made of that estate during the coverture, and that therefore

^a See 1 Pr. Abs. 336.

^b Bryan v. Woolley, 2 Bro. P. C. 387.

^c Humphreys v. Hollis, 1 Jac. 75,

she may compel the purchaser to perfect his bargain. At the time of entering into the contract, he knows, or may be presumed to know, the legal consequences incident to a purchase of the property of a married woman, and cannot therefore complain of the want of mutuality on his side, in being unable to compel a performance of the contract by her.

Some dispositions however there are affecting the wife's freehold, capable of being made during coverture, which will be binding upon herself and her heirs when that state of disability has ceased to exist.

Therefore if a fine be levied or recovery suffered by husband and wife, and a declaration of the uses thereof be made by the husband alone, the same will be binding upon the wife, unless she dissents therefrom during the coverture.^t

And if upon a partition made between two coparceners and their husbands, the allotments be of equal yearly value, such partition cannot be afterwards avoided, since they are compellable by law to make partition. But if the part allotted to the one be less in value than the part allotted to the other, though the same shall stand good during the lives of the husbands, yet after the death of the husband of her who had the lesser part, she may enter upon her sister's part, and defeat the partition.^u

Also a partition by force of the king's writ, and judgment thereupon given, will bind the feme-covert for ever, though the parts were not of equal annual value, because made by authority of law.^v

And if a husband seised of land in right of his wife, whereof B. the wife of A. is dowable, assign the third part thereof to B. for her dower, the assignment will be binding upon the wife of the assignor.^w

^t See 1st resol. in Beckwith's ca. 2 Co. Rep. 56 b. 1 Pr. Abs. 358, 1 Pr. Conv. 314.

^u Lit. ss. 256, 257. Co. Lit. 170b. 171a.

^v Co. Lit. 171 a. This compulsory mode of effecting a partition is nearly become obsolete.

^w Perk. s. 399. Co. Lit. 35 a. n. (3.) [17th ed.]

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tions af-
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What dis-
positions
are binding
upon wife.

Declaration
of uses by
husband
alone ac-
quiesced
in during
coverture.

Partition.

Assign-
ment of
dower by
husband.

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sitions af-
fecting the
property of
femes-
court.

Convey-
ances by
wife war-
anted by
custom.

By statute.
Execution
by wife of
powers ap-
pendant, in
gross, or
collateral.
Convey-
ances by her
as attorney.

Convey-
ances in
perform-
ance of
conditions.
Coverte
r no protec-
tion against
fraud.

Where dis-
position by
husband

Where the custom of some towns and boroughs authorizes conveyances of the estates of feme-covert to be made without fine or recovery, such conveyances will be conclusive upon them when the coverture ceases.

And surrenders by feme-covert of leases affecting their property pursuant to the statute of 29. G. 2. c. 31. will be sustainable, though not effected through the medium of either a fine or recovery.

A feme-covert may also execute a power, whether appendant, in gross, or simply collateral, without fine or recovery, and without her husband's concurrence, though the disability of coverture be not dispensed with^a; and as well over copyhold as freehold estate.^b And she may convey an estate as the attorney of another, and in the same manner as her principal might have done, whose conveyance indeed that of the attorney is considered to be^c. She may also convey in performance of a condition^d: and may forfeit a conditional gift.^b

Neither will coverture be any more an excuse in case of fraud, than infancy^c: for though the law prescribes formal conveyances and assurances for the sales and contracts of infants and feme-covert, which every person who contracts with them is presumed to know; yet when their right is secret, and not known to the purchaser, but to themselves, or to such others who will not give the purchaser notice of such right, so that there is no laches in him, a court of equity will relieve against that right, if the person interested will not give the purchaser notice of it, knowing he is about to purchase.^d

A case may exist, where, in consequence of the prejudice which might otherwise result to third persons, a wife has

^a Sug. Pow. 155. But see 1 Pa. Abs. 340.

^b Driver v. Thompson, 4 Taunt. 294.

^c Sug. Pow. 154. 1 Pr. Abe. 333.

^d W. Jo. 157, 158. 1 Rol. Ab. 421. 2 Rol. Rep. 68. Bro. Ab. tit. Cui in vita, pl. 15.

^a See 2 Ves. jun. 560. in Lady Cavan v. Pulteney.

^b See supra, page 54.

^c Savage v. Foster, 9 Mod. 35.;

and see 6 Ves. 181. in Evans v. Bicknell. 2 Mad. 451. in Cory v. Gertchen.

an election to avoid a disposition made of her estate by herself and husband during coverture, though the subject of it be of a chattel nature; forming therefore an exception to the general rule that the husband may dispose of all his wife's chattels as well real as personal.

As if a woman guardian in socage marries, and joins with her husband by indenture in making a lease for years of the ward's lands; after her husband's death she may avoid this lease: for though the husband has absolute power to dispose of all chattels either real or personal whereof he is possessed in right of his wife, and the wardship of the body and land is but a chattel; yet the wife being possessed of it in right of the infant, and accountable to him for the profits when he comes of age, the husband's disposition shall not bind after his death, but she may avoid the lease in right of the infant, whose guardian she still continues to be.[•]

The same election which a wife and her heirs may exercise upon the death of her husband in avoiding or confirming the voidable dispositions made of her estate during coverture, she and her heirs may also exercise at the like period with reference to property acquired by herself and husband jointly, or by her solely, during the continuance of the coverture.[•]

Thus if lands are given to husband and wife, and the heirs of the husband, who dies; the wife may disagree to this estate made during the coverture, and then it will be an estate to the husband and his heirs ab initio, and so she shall have her dower thereof: and the bringing a writ of dower will constitute a disagreement to take by purchase.[•]

And if the estate be made to the husband and wife for the life of the husband, remainder to the right heirs of the husband; though the estate upon the husband's death be determined and gone, yet it has been thought that the wife may disagree to the same by bringing a writ of dower.[•]

[•] Co. Lit. 351 a. 1 Rol. Ab. 345.
[•] 2 Bl. Com. 292, 295.

[•] Perk. s. 352. 3 Co. Rep. 27 b.
[•] Perk. s. 353.

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sitions af-
fecting the
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and wife of
her chattel
may be
avoided.

Disposi-
tions of
property
acquired
during
coverture
voidable
by wife.

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sitions af-
fecting the
property of
feme-
covert.

Again, if a lease for years be made to husband and wife rendering rent; upon the husband's death, the wife may either avoid or affirm the lease at her election; and if she agrees to it, debt lies against her for all the arrears incurred in the life of the husband.¹

And by all reservations depending upon land leased to baron and feme by indenture, as re-entry and doubling the rent for non-payment, or a fine nomine poenae, the feme will be bound if she agree to the lease; but by a collateral covenant, or obligation in the same indenture to bind them in a sum in gross, as by a covenant charging the person, and not the land leased, or an obligation for non-payment of the rent, or to give such surety as the counsel of the lessor should devise, or by grant to distrain in other land, she will not be bound.²

And if baron and feme accept a fine, rendering rent; if she agree to the estate after the death of the baron, she will be charged with the rent.³

Purchase
by wife
voidable by
husband,
&c. at elec-
tion.

If a feme covert purchase an estate, (not acting under a power for that purpose,) her husband may either avoid or adopt the purchase at his election; and if the former, may maintain trover for the purchase money: but if he neither agree nor disagree to the purchase, the same will be effectual: and though the husband may have agreed to the purchase, yet after his death the wife may exercise a similar election either in avoiding or confirming it: and if she do not agree to it, her heirs may waive it.⁴

Election to
avoid void-
able dispo-
sitions
when deter-
mined.

Not by ac-
ceptance of
rent upon

II. The commission of what acts by the wife or her heirs does and does not preclude an exercise of election to avoid or affirm the voidable dispositions made of her estate during coverture.

It is said, that acceptance by the wife after her husband's death of rent reserved upon a feoffment made of her free-

¹ 1 Rol. Ab. 349.

² Bro. Ab. tit. Coverture, pl. 11. tit. Covenant, pl. 6.; and see ibid. 2

¹ 1 Rol. Ab. 349.

¹ Garbrand v. Allen, 1 Ld. Raym. 224. Co. Lit. 3a. Barnfather v. Jordan, Doug. 451. [3d ed.] Sug. V. & P. 502. [5th ed.]

hold during coverture, but to which she was no party, will not be the means of rendering the instrument conclusive upon her, which would have been the case had she been made a party to it.^m

But upon the joint feoffment of the husband and wife of her estate, a distinction appears to exist, in regard to her subsequent agreement thereto, between a covenant contained in the indenture on the part of him to whom the same is made, and a reservation. As if husband and wife sell the land of the wife, and make a feoffment, and the vendee by the same indenture covenants to pay an annuity to them during their lives, and the wife upon the husband's death accepts the annuity; this has been said to be no bar in *cui in vitâ*ⁿ, being by covenant or annuity and not as reservation or rent.^o And the same difference, if law, it might be expected would equally prevail between covenants and reservations contained in other voidable instruments in regard to the wife's subsequent confirmation thereof.

If husband and wife make an exchange of her land, and upon his death she enter and occupy, she will be bound thereby; contra if she waive it, and do not occupy.^p

So if upon an unequal partition made between two coparceners and their husbands, after the death of the husband of her who had the lesser part, she enter thereupon and agree thereto, she will be bound by the partition, the same being voidable only.^q

And if lands be given to husband and wife in tail, and the husband aliens the same to the use of himself and his heirs, and afterwards devises them to his wife for life, and dies, and the wife enters claiming by word the estate for life; this is a good disagreement to the estate of inheritance, and a good agreement to the estate for life.^r

^m Bro. Ab. tit. Accep. pl. 1. But quære if this be law.

ⁿ Quære, nor will it bar an entry since the stat. 32 H. 8.

^o Bro. Ab. tit. Cui in vitâ, pl. 1., and see 1 Rol. Rep. 81. in arg.

^p Bro. Ab. tit. Barre, pl. 27. tit. Exchange, pl. 9. Keil. 10 a. Perk. s. 290.

^q Lit. ss. 256, 257. Co. Lit. 170b. 171 a.

^r 3 Co. Rep. 26b.

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sitions af-
fecting the
property of
femes-
covert.

feoffment
by hus-
band : but
quære.
Contra
upon feoff-
ment by
husband
and wife.

By entry
upon ex-
change.

By entry
after un-
equal par-
tition.

By entry
upon pro-
perty ac-
quired dur-
ing cover-
ture.

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As to disposi-
tions af-
flicting the
property of
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covert.

By laches.

By fine.

Voidable
dispositions
when to be
avoided.

An instrument voidable by the wife may also be rendered good by reason of her laches.

Thus where a fine had been levied by husband and wife, and a declaration of the uses thereof made in favour of a purchaser by the husband alone, and no other deed was shown declaring different uses, and the uses declared did not vary from what the wife intended, and the wife acquiesced in the declaration for fifteen years after her husband's death; the Court of Chancery dismissed a bill by which it was attempted to set such declaration aside.¹

A fine levied by the wife upon the husband's death of her estate which was discontinued during the coverture, previously to her entering thereupon, will preclude her from afterwards doing so.

For where husband and wife were tenants in special tail, with remainders over, and the husband discontinued and died, and after his death the wife levied a fine; it was resolved that the fine had strengthened the discontinuance made by the husband, so that she could not enter to be remitted.²

And it may be observed, that if a feme-covert levy a fine by herself as a feme sole of land whereof she is seized in fee, to another and his heirs; if the husband neglect to enter, the fine will bind the wife and her heirs; but if he enter and die, the conusee shall not have the land; for by the entry of the husband, the whole estate of the conusee was defeated, and the old estate of the wife revested in her, and the husband seized of the whole estate as in the right of his wife.³

The proper period for the wife and her heirs to make an entry upon her estate which has been conveyed away during coverture by such means as are not conclusive upon her depends upon the circumstance whether she or her husband was the longer liver: if she outlives her husband, then the period for making the entry is upon the

¹ Swanton v. Raven, 3 Atk. 105. ² 7 Co. Rep. 8 a. b.

³ Nicholas Moore's ca. Palm.
565. 2 Rol. Rep. 311.

decease of the husband; but if he survives his wife, the period proper for the heirs of the wife to make an entry is upon her decease. But if the husband is entitled to be tenant by the curtesy, then the time for entering is suspended until after his death. Thus Lord Coke says, if the husband hath issue, and maketh a feoffment in fee of his wife's land, and the wife dieth, the heir of the wife shall not enter during the husband's life either by the common law or by the statute.^v

Though the principle that a feme-covert has no power to make a contract without her husband^w seems to be contradicted by the case of *Baker v. Child*^x, wherein it is reported to have been said by the Court, that where a feme-covert, by agreement made with her husband, was to surrender or levy a fine, though the husband died before it was done, equity would compel the woman to perform the agreement; yet this was stated by counsel in the case of *Thayer v. Gould* to be falsely reported, and to have been no more than a recommendation by the Court, the parties being present and consenting, to a referee, to make an end of the affair between the parties by his private award, which was to be final.^y

But though, generally speaking, a feme is not bound by her agreement made during coverture, yet if when a widow she acts according to such agreement, she will be bound by it.^z It seems however, that if her acting when a widow may be indifferently applied either to her former interest or to her agreement, she shall not be concluded by it.^a

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sitions af-
flecting the
property of
femes-
covert.

Contracts
of femes-
covert
voidable.

When
conclusive.

It was intended to introduce at this place a section, wherein election should be considered in application to the

^v Co. Lit. 526a.

^w 1 Sid. 120.

^x 2 Vern. 61. 1 Eq. Ca. Ab. 62.
pl. 2.

^y 1 Atk. 617.; and see Amb. 498.
where it is said, that the note of
Baker v. Child was very loose. In
2 Vern. 225. it is said, that where

a feme and her husband agreed to an inclosure, she was bound by it even as to her jointure; and Lady Winnington's ca. is cited.

^z *Maynard v. Moseley*, 1 Ch. Ca. 255.

^a *Thomas v. Lane*, 2 Ch. Ca. 27.

CHAP. III. doctrine of *remitter*, and with particular reference to dispositions affecting the property of feme-covert as connected therewith: but in consequence of the very rare occurrence of that doctrine, and of its having been already treated of in a much esteemed work^b, it has been deemed proper to omit the section which had been prepared for the purpose.

SECTION 4.

Election considered in Application to Leases made of the Property of Femes-Covert, not warranted by the Statute of 32. H. 8. c. 28.

What leases
are void-
able.

By the common law, if husband and wife were seised of an estate of freehold or inheritance in right of the wife, and they jointly had made a lease for life or years of that estate by deed, the same continued indefeasible during the joint lives only of the husband and wife; but upon his death, such lease did not, by reason of the interest the husband acquired in his wife's freehold by marriage, become absolutely void, but it might have been either avoided or rendered good at the election of the wife if she survived her husband, and of her heirs if she died in his life-time.^c And so it seems the law may be considered to have been with reference to freehold leases made by the husband solely.^d But whether a lease for years made by the husband alone of the wife's freehold was so absolutely void upon his death, as to be incapable of being adopted by the wife and her heirs by the commission of some confirmatory act on the happening of that event, or was voidable only^e, is a point upon which the books are much at variance.

^b See 1 Rop. Husb. and Wife, 67. et seq.

^c Bro. Ab. tit. Barre, pl. 27. tit. Accep. pl. 6. 10. tit. Leases, pl. 24. tit. Receit, pl. 70. Keil. 10. 1 Rol. Ab. 349. Cro. Jac. 563. Lit. s. 594.

^d Bac. Ab. 15. 2 And. 3. in Fulwood's ca.

^e See supra, page 104.

The authorities treating such a lease as void are, Bro. Ab. tit. Accep. pl. 1. 6. tit. Exchange, pl. 9. tit. Barre, pl. 27. tit. Leases, pl. 24. 2 Co. Rep. 77 b. Shep. To. 281. [7th ed.] Such a lease is also treated as void in 1 Rop. Husb. and

In Lord Coke's reports it is said to have been adjudged in a case to which reference is there made, that where a husband was seised of land in the right of his wife, and made a lease to A. for twenty-one years, and afterwards together with his wife levied a fine sur conusance, &c. to B. and his heirs, and died, — the lease was ended by his death, and should be avoided by the conusee, since the husband joined but for conformity and necessity.¹ In the Touchstone also it is laid down, that if at the common law the husband had made a lease of his wife's land, and died, the lease had been void, and that so the law still was.² In the case however of *Jordan v. Wikes*³, a lease for years made by the husband alone of his wife's lands was held not to be determined nor void upon the husband's death, but voidably only; and so the law is laid down clearly to be in Bacon's Abridgment⁴: and it is elsewhere said, that if a man makes a lease for years of his wife's land, and dies, the lease is not void before entry made by the wife, for that possession ought to be avoided by possession, and such possession ought to be gained by entry.⁵ In this conflict of authorities it may not be considered going too far to state it as a prevalent opinion of the present day, that the leases under immediate consideration are voidable only upon the husband's death, and therefore capable of being either avoided or affirmed at the election of the wife and her heirs, and are not absolutely void.

It has been suggested, that the cases may perhaps be reconciled by distinguishing between leases for life and years⁶; that in the former case, as the estate commenced by livery, it can only be avoided by entry; but that in the latter, the lease is absolutely void and determined by the

Wife, 93, 94.; and see n. (a). ibid. Ab. 388, 389. 1 Rol. Rep. 402. [2d ed.]. The authorities treating such a lease as voidable only are, Bro. Ab. tit. Accep. pl. 10. Jordan v. Wikes, Cro. Jac. 332. 1 Rol. Ab. 768. Hob. 5. 4 Bac. Ab. 13. Plow. Com. 137. 4 Leon. 15. in Harvey and Thomas, per Gawdy J. 2 Co. Rep. 77 b.; and see 1 Rol.

Ab. 388, 389. 4 Bulst. 273.

" Shep. To. 281. [7th ed.] But Mr. Preston's opinion is contra.

^a Cro. Jac. 332.; and see 1 Rol. Ab. 768. Hob. 5.

^b 4 Bac. Ab. 13.

^c Plow. Com. 137.

^d See 2 Saun. 180. n. (9.) [3d ed.]

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able leases
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perty of
femes-
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husband's death: and upon an examination of the authorities the conclusion arrived at is, that the law upon the point is not so clearly agreed, as in Bacon's Abridgment¹ it is represented to be.

The argument of those who would contend that such leases are voidable only seems to acquire some strength from the circumstance of an action of debt being maintainable by the husband for rent reserved upon a lease for years made by himself alone of his wife's land before entry by her heir^m; and from its being said, that if a man seised of land in right of his wife lease the same for years, rendering rent, and the wife dies without having had any issue by him, whereby he is no tenant by the courtesy, but his estate is determined, yet he may avow for the rent before the heir hath made his actual entry.ⁿ From the language of the proviso in the statute of 32. H. 8. c. 28. s. 3. a fair inference is also deducible, that the framers of it conceived the leases of the husband alone to be voidable only.

If a lease made of the wife's freehold by feoffment or grant was for the life of the lessee, it was voidable at common law by action only, since a discontinuance was thereby effected; if it was for a chattel interest, or for the life of the wife, it was voidable either by her entry or action.

By the statute of 32. H. 8. c. 28. it was enacted, that all leases made of property whereof husband and wife were seised for any estate of inheritance in fee simple or fee tail in her right, or whereof he was seised jointly with her, should be effectual against the wife and her heirs, so that the wife where she had the sole inheritance in the property leased joined therein^o, and provided that such leases did not exceed the term of twenty one years or three lives, and in other respects complied with the statute; and, as before observed^p, the statute also gave an entry to the wife

¹ Supra.

^m See 1 Rol. Rep. 402. 4 Bulst.

273.

ⁿ See Vaugh. 46. in Dixon v. Harrison. Bro. Ab. tit. Avow. pl.

123. 8 T. R. 489. 493. ⁴ Bac. Ab.

17.

^o Smith v. Trinder, Cro. Car. 22.

^p Supra, page 100.

and her heirs in cases where her freehold had been discontinued during the coverture, and removed the necessity of resort being had to a real action.¹

If then a lease be now made of the wife's freehold or inheritance by herself and husband, or as it seems by him alone, and does not in all respects comply with the requisitions of the above-mentioned statute, in either case the same will be voidable only, and may be either avoided or affirmed by the wife and her heirs at election.

With respect however to leases of things lying in grant, and to which the enabling statute of 32. H. 8. does not extend, the same distinction that has been taken in a former page as to leases made by tenants in tail of incorporeal property would seem equally applicable to leases of such property belonging to feme-covert, namely, that the same, if made for a freehold interest, are void upon the determination of the coverture, if for a chattel interest, are voidable only upon that event.² And for the purpose of avoiding repetition, recourse may be had to what has been already said upon the point in the place alluded to.³

Some further observations may be made with reference to such leases as are voidable under the following divisions:

I. As to the election which arises to the wife and those claiming under her, upon the death of the husband, to avoid leases made of her freehold or inheritance during the coverture by him solely, or by them jointly, and not warranted by the statute of 32. H. 8.

II. As to the commission of what acts by the wife, or those claiming under her, do and do not preclude such election.

I. It may in the first place be observed, that previously to the statute of 32. H. 8., the law, in reference to parol leases made by husband and wife of her estate reserving rent, seems to have been, that though the wife had received rent thereupon after her husband's death, yet such acceptance would not have precluded her from avoiding the

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Leases of incorporeal property not warranted by statute when void and when voidable.

¹ See Drybutter v. Bartholomew, ² See supra, page 92.
infra, page 119.

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lease, unless made by indenture, since her consent was said to be requisite to the commencement of the lease, which ought to have been by deed.^{*} But all discussions upon parol leases were in a great measure superseded by the statute of frauds^t, which provides, that all leases of land, except those not exceeding the term of three years, must be in writing, and signed by the parties or their agents lawfully authorized.

Right of avoiding present voidable lease not assignable.

As the right of election to avoid a present lease made by tenant in tail appears, from what has been before said^u, not capable of being assigned; so the right of election to avoid a similar lease made by husband and wife of the wife's lands is it would seem not assignable.

For where the husband and wife made a lease of ninety-nine years by indenture of the wife's lands, and afterwards joined in levying a fine of the reversion to a stranger; it seems to have been thought, though no decision was come to upon the point, that the conusee should hold subject to the lease; for that the same being made by indenture was not absolutely void, but only voidable by the wife after her husband's death; and that her joining in a fine of the reversion before her time of election came destroyed her power of election, and could not transfer a like power to the conusee, being a thing merely in action.^v

But transmissible by act of law.

But the power of election which the wife hath to avoid a voidable lease made during coverture is susceptible of transmission by act of law, as by the second marriage of the wife.

Thus where a husband and wife made a lease for years by indenture of the wife's lands, rendering rent, and the lessee entered, and the husband, before the day for payment of rent, died, and the wife before the day took a second husband, who accepted the rent, and died; it was held that the wife could not now avoid the lease, for that by her second marriage she had transferred her power of

^{*} Dy. 91. in pl. 13.

^t 29. C. 2. c. 3.

^u Supra, page 94.

^v Cadee and Oliver's ca. 3 Leon.

153. Cro. El. 152. 4 Bac. Ab. 15,

16.

avoiding it to her husband, and that his acceptance of rent bound her, as her own before such marriage would have done.^w

This power of election however is exercisable only by the wife and those claiming in privity through her, and not by those who claim under a title paramount to the wife.

As where husband and wife (in her right) and a third person were jointenants for the life of the wife and such third person, and the husband and wife let their moiety by indenture for twenty-one years, and on the wife's death the surviving jointenant entered; the Court held the lease to be good, and to bind the survivor, and that it was as a lease made by the wife until she, or one claiming in privity by her, avoided it by entry, which could not be done by the other jointenant, who was paramount the wife, and not under her.^x

If the wife dies before her husband, the same election and power which she would have had on surviving her husband of avoiding or affirming voidable leases made during the coverture descends upon her issue or heir, and such leases continue good until avoided by those who derive title through the wife.

So that where a woman tenant in tail, having issue by a former husband, after his death married a second husband, and they by indenture joined in a lease for years of the wife's lands, rendering rent; and then the wife died without issue by the second husband, whereby he was not entitled to courtesy: until the issue by the first husband entered, the lease continued good.^y

The lease of baron and feme will be voidable only, and not absolutely void, though no rent be reserved thereupon. For where baron and feme joined in a lease, without re-

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By whom voidable lease may be avoided.

^w Dy. 159. pl. 56.; and see mar. Jac. 417. pl. 6. 3 Bulst. 272. 1 Rol. ibid. 1 Rol. Ab. 475. 2 Rol. Rep. Rep. 401. 441. 1 Rol. Ab. 592. 152.

^x Smallman v. Agborrow, Cro. Yelv. 78.; but see 8 T.R. 493.

Lease of baron and feme voidable,

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though no rent reserved.

Lease of copyhold property voidable.

Election to avoid voidable leases when determined.

By acceptance of rent.

serving any rent; on the question whether it was a good lease, it was objected that it could not be made good by the feme by any acceptance, and therefore it was not the lease of the feme any more than if it was by an infant and no rent reserved, which had been a void lease^a: but it was ruled to be contrary of a baron and feme, for that the baron had power, and that the feme joining in the lease, the same was not void, for she might affirm it by bringing a writ of waste, or accepting fealty.^a

The before-mentioned statute of 32. H. 8. has been held not to extend to copyhold property.^b If then a lease for years be granted by a husband of his wife's copyhold estate, which the custom of the manor does not warrant, the same is voidable by the wife upon the husband's death, and her entry will purge the forfeiture induced by the lease.^c

II. The inquiry into what acts committed by the wife and those claiming in privity under her do and do not preclude an election to invalidate or affirm voidable leases made during coverture hath been anticipated to a certain extent by the corresponding parallel inquiries: but some cases and distinctions applicable to the present inquiry may be here introduced.

If an abator marries with the right heir, and has issue by her, and makes a lease for life, rendering rent, and he and his wife die, the issue has the mere right on the part of his mother; and yet if he accept the rent, and make acquittance, it shall estop him and his heirs from avoiding the lease in respect of the recompence.^d

So the wife's receipt of rent accruing due after her husband's death is one of the most obvious acts of confirmation. Therefore if baron and feme join in a lease of the land of the feme, rendering rent, and the baron dies,

^a But it now seems, that the lease of an infant is voidable only, though no rent be reserved thereupon; see supra, page 60.

^a Hut. 102.

^b See Cro. Car. 44. •
^c Saverne v. Smith, Cro. Car. 7,
 2 Rol. Rep. 561. Cro. El. 149.
¹ Rol. Ab. 509.
^d 8 Co. Rep. 54 b.

and the feme afterwards accepts the rent, she shall be bound.^c

Again it is said, if baron and feme lease the land of the feme for life, it is her lease for the time, for by the receipt of rent after the baron's death the lease is affirmed.^f And she will be liable to a covenant.^g

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Accordingly, where baron and feme leased lands of the feme for the lives of three persons and the life of the survivor, rendering rent, and made livery in person, and the feme upon the baron's death received the rent; the lease was resolved to be good and binding upon the feme.^h

And where by a marriage-settlement land was limited to the use of the wife for life, remainder as she by deed or will attested by three witnesses should appoint, with reversion to herself in fee, and she and her husband granted a lease of part of the settled estate to the defendant, but the same was attested by two witnesses only; such lease was held to be voidable by the wife on her husband's death, and her receipt of rent accruing afterwards to be a confirmation of it.ⁱ

But where baron and feme made a mortgage by lease for 1000 years without fine of a share in the New River, whereof they were seised in her right, reserving a peppercorn rent; and after the baron's death she received the profits, and paid the interest; a bill of foreclosure brought by the mortgagee was dismissed by the Master of the Rolls, he holding that in this case there was no acceptance, and the lease was of an incorporeal thing out of which rent could not be reserved; and that the same expiring by the husband's death, the mortgage was thereby also determined, and nothing remaining to foreclose: but he observed, that if there had been a rent reserved, the feme's acceptance of it would have affirmed the lease.^j

When not
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ance of
profits.

^a Bro. Ab. tit. Accep. pl. 6. Keil. 10a. 2 And. 42. 5 Leon. 271.

^b Greenwood v. Tyber, Cro.Jac. 563.

^c Bro. Ab. tit. Resceit, pl. 70.

^d Doe v. Weller, 7 T. R. 478.

^e Wootton v. Hele, 1 Mod. 271.

^f Drybutter v. Bartholomew,

2 P. Wms. 127.

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When by re-delivery of deed.

Consequence of disagreement to voidable lease.

Where however a demise was made by baron and feme by way of mortgage for ninety-nine years of certain houses belonging to the feme, without any fine being levied thereof, and the feme, after the husband's death, re-delivered the deed; it was held that such re-delivery was a sufficient confirmation of the deed to bind her, without its being re-executed or re-attested; and that circumstances alone might be equivalent to such re-delivery.^k

The consequence of the wife's disagreement to a voidable lease made by herself and baron is, that things will be viewed in the same light as if no such lease had been made.

As where baron and feme, seised in tail, made a lease reserving rent, and upon the baron's death she entered and died, and the lessee entered and committed waste; upon action brought by the issue in tail, counting of a lease made by baron and feme, and the defendant pleading that the baron and feme did not demise, issue was joined; and it was adjudged against the plaintiff, because the feme had election to agree or disagree to the lease, and that when she disagreed, it was the same thing as if it had never been her act.^l

SECTION 5.

Election considered in application to the dispositions of spiritual corporations sole and aggregate.

By the common law, and previous to the statutable enactments after noticed, bishops, with the confirmation of the dean and chapter, parsons and vicars, with consent of the patron and ordinary, and other sole corporations, with the concurrence and confirmation of the persons who had the

^k Goodright v. Straphan and others, Cowp. 201. As to delivery, see Co. Lit. 36a. 2 Rol. Ab. 26. pl. 2. ^l Thetford v. Thetford, 1 And. 220. Perk. s. 154.

guardianship of the fee, might make leases for years or for lives, gifts in tail, or estates in fee of their respective possessions, without any limitation or control. If any such dispositions were made without the requisite sanction, they were either void or voidable at the election of the persons who came in next succession to those by whom the property had been so disposed of.^m And corporations aggregate might dispose of their estates in what manner soever they pleased, without the sanction of any other persons.ⁿ

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By the statute of 32. H. 8. c. 28. it was in effect enacted, that leases made by persons having any estate of inheritance either in fee-simple or fee-tail in right of their churches, (except parsons and vicars,) and complying with the several requisites therein mentioned, should, without the concurrence of any other persons, be binding upon the lessors and their successors.

This statute, which extended to sole corporations only, made no alteration in the common law respecting the ability of such corporations to dispose of their property howsoever they thought proper, so that the dispositions thereof received the confirmation of the persons competent to give the same; its effect was only to authorize the creation of the specific estates mentioned therein, without requiring that confirmation which before its enactment was requisite to make such estates indefeasible.

With the view therefore of partially restraining such general power of disposition, the statutes of 1. Eliz. c. 19. and 13. Eliz. c. 10. were passed^o; the former of which enacted, that all gifts, grants, feoffments, fines, or other conveyances made by archbishops and bishops of their respective possessions, (which include even those confirmed by the dean and chapter,) other than for the term of

^m Co. Lit. 44 a. 2 Bl. Com. 318. Compl. Incumb. 424, 425. 4 Bac. Ab. 39.

ⁿ Compl. Incumb. 427.

^o And see statutes 13. El. c. 20., 14. El. c. 11., 18. El. c. 6. 11., 43. El. c. 9., 39. & 40. G. 3. c. 41.,

57. G. 3. c. 99., and 2 Bl. Com. 320. A lease made to a spiritual person against 21 H. 8. c. 15. is not

absolutely void as between the lessor and lessee, but voidable only. See 1 Leon. 309. 3 Keb. 436.; and see 57. G. 3. c. 99.

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twenty-one years or three lives from their commencement; and whereupon the accustomed yearly rent or more should be reserved, should be void.^p The latter of the above statutes extended the restrictions laid upon archbishops and bishops by the former one to all other ecclesiastical persons, whether corporations sole or aggregate.

It is observable, that lay corporations aggregate, such as mayor and aldermen, bailiff and burgesses, are unaffected by any of the before-mentioned statutes.^q Neither do they extend to rectories, and tithes that are impropriated and become lay fee, and remain in the hands of laymen, who may deal with them as with any other inheritances whereof they are seised.^r

And if a parsonage be of a copyhold manor, which it may, parsons and vicars, as well as other ecclesiastical persons, may grant copies for life, in tail, or in fee, according to the custom of the manor, notwithstanding the above-mentioned statutes.^s And grants by bishops and other ecclesiastical persons of ancient offices and fees are not within the 32. H. 8., nor are they restrained by the statutes of 1. and 13. Eliz., but remain as at common law, and consequently, if made with the requisite confirmation, will be binding upon the successors.^t

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 made by
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 voidable at
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The inferences to be drawn from what has been said respecting the ability of corporations, sole and aggregate, to dispose of their property are, as regards our present purpose, that all leases made by bishops or other sole spiritual corporations under the restrictive provisions of the two last-mentioned statutes must, if not warranted by the 32. H. 8. c. 28., have the confirmation of the dean and chapter or other persons competent to give such confirmation, in order to make them binding upon the suc-

^p Grants to the crown were expressly excepted out of this act, but such exception was afterwards removed by st. 1. Jac. 1. c. 3.

^q 1 Sid. 162.

^r 4 Bac. Ab. 97.

^s 4 Co. Rep. 23 b. 24 a. 1 Rol. Rep. 202, 203. 4 Bac. Ab. 72, 73.

^t Co. Lit. 44 a., and n. (1.) ibid. [17th ed.] Sir John Trelawney v. Bishop of Winchester, 1 Burr. 219.

5 Bac. Ab. 183. Shep. Te. 282. [7th ed.]

censors, the necessity of such confirmation not being removed by either of the said statutes.^u If then leases made either by corporations sole or aggregate do not comply with the requisitions of the statutes of 1. and 13. Eliz., and, if made by sole corporations, are not sustainable under the provisions of the statute 32. H. 8., they will be subject to the same defeasibility as attended the dispositions of corporations not having the requisite confirmation at common law, which was, that of being either void or voidable at the election of the successors^v: but though such dispositions may be avoided by the successors, yet, if made by a sole corporation, they are good against him during his life; and, if made by an aggregate corporation, are good so long as the head of it lives, he being presumed to be most connected in interest.^w

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It is further proposed to inquire into the nature of that power of election which arises to the successors of corporations sole and aggregate to avoid or affirm estates created by their predecessors, and not sustainable under the statutes before observed upon: and for this purpose some observations may be made under the following arrangement:—

I. As to the differences existing between dispositions made by such sole spiritual corporations as by the common law are supposed to have the whole fee-simple of their possessions vested in them, and dispositions made by such sole spiritual corporations as are considered to have only a qualified fee-simple in their possessions vested in them; and the effect of the statutes thereupon.

II. What the law is in application to dispositions made by spiritual corporations aggregate.

^u Compl. Incumb. 428, 429.

^v See Bishop of Salisbury's ca. 10 Co. Rep. 60 b.

^w Co. Lit. 45 a. 2 Bl. Com. 321. 4 Bac. Ab. 118. By stat. 17. G. 3. c. 53, incumbents of livings, with consent of the patron and ordinary, are empowered to raise money by mortgaging the glebe for building,

repairing, or purchasing houses, &c.; and by 55 G. 3. c. 147., they are enabled to exchange their parsonage houses or glebe lands, and to raise money by a mortgage of tithes for purchasing lands to be annexed to the benefices. And see 6. G. 4. c. 8.

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III. By what successors an election to avoid or affirm voidable dispositions made by spiritual corporations sole or aggregate may be exercised.

IV. The commission of what acts by such successors does and does not preclude an election to avoid or affirm voidable dispositions made by their predecessors; and in what manner the same may be avoided.

I. By the common law, bishops were considered to have the whole fee-simple and inheritance of their possessions vested in themselves; and it was therefore competent to them, previously to the third Council of Nice*, by their sole alienation, without the confirmation of the dean and chapter, to bind their successors for ever. By the canons made at that council, which received the sanction of our law, this general power of alienation was restrained, and the confirmation of the dean and chapter rendered necessary. But such canonical regulations did not intrench upon the principle of the fee-simple in the possessions of bishops residing in them, which therefore still continues to be the case; but the effect produced was, to enable the successors to avoid such dispositions made by their predecessors as were in contravention of the canons; such dispositions however were good as against the bishops themselves so long as they continued bishops, and remained good after their death or removal until the successors came to avoid them, and did not become absolutely void on the happening of either of those events; so that it was at the election of the successors either to avoid or confirm during their time such the dispositions of their predecessors. And the law appears to have been the same with respect to leases made without confirmation of the possessions of abbots, priors, or deans, &c. where they were sole seised.^y

What dis-
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If then a bishop, or other sole corporation whom the law supposes to have in him the whole fee-simple of his

* Anno 710.

Lit. 45 a, b., 341 a, b. 6 Co. Rep.

^x Bro. Ab. tit. Accep. 9, 10.; tit. 8 a. Hetl. 24. 1 Rol. Ab. 481. Confirm. 21.; tit. Lease, 18. 32, 33. Bridg. 94. 3 Co. Rep. 65 a. 2 Keb. Poph. 121. Dy. 46. pl. (9). Co. 325. 4 Bac. Ab. 120.

possessions, makes any disposition thereof; the same, whether with or without confirmation, is conclusive upon him during his life, or continuance in the corporate capacity; but upon his death or removal, such disposition, if not warranted by any of the before-mentioned statutes, does not become absolutely void notwithstanding those statutes, but is either void or voidable at the election of the successor: but when once avoided by a successor who has the whole estate in him, it cannot be afterwards revived.

But though the general rule is, that a voidable lease, when once avoided, cannot be restored to its voidable character, yet an exception to this rule exists in the case of a voidable lease granted by a bishop, and the temporalities of the bishopric afterwards falling into the hands of the king; in which case it is competent to him to avoid such lease during the vacancy of the bishopric; yet his doing so shall not so avoid the lease that it cannot be restored to its former state, but the succeeding bishop may make the same either good or void at his election, to be evidenced either by his doing some express act, as by actual agreement to the lease, or some implied act, as the acceptance of rent incurred after the death of the predecessor, or the doing other acts which amount to an agreement in law. And the reason assigned for the avoidance of the lease by the king not operating as a perpetual avoidance of it is, that the king hath not the fee-simple in the temporalities, but only the custody or guardianship of them during the vacation of the bishopric, which is but a temporary and qualified interest.²

An instance of a disposition by a bishop being conclusive upon himself is supplied by a case where a bishop by deed enrolled gave lands to the queen without consent of the dean and chapter; and such gift was held to be good against him.^a

^a Earl of Bedford's ca. 7 Co. Rep. 7. 4 Bac. Ab. 119, 120.

^b Magdalen College ca. 1 Rol. Rep. 151. Co. Lit. 45 a. n.(4.) [17th ed.]

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It has been stated what the common law was in application to dispositions made by bishops, and such other sole corporations as had in them the whole fee of their possessions.

But it has been said, that the before-mentioned statutes effected a difference where things which lay in grant were leased for a freehold interest, and where for a chattel interest only; and that if a bishop made a lease for *lives* of a portion of tithes, or other things lying in grant, and died, and his successor accepted the rent; yet such acceptance should not bind him, because the lease was absolutely void by the bishop's death; for that of things lying in grant, no rent could be reserved recoverable by the successor; and he could not distrain, there being nothing to distrain upon; and that an action of debt would not lie, the lease being for *lives*, and so no action of debt was maintainable till after the *lives* ended: but that if the tithes or other things lying in grant had been let for *years*, the successor's acceptance of the rent would have bound him during his time, because he might have had an action of debt for any arrears that should incur after.^b

It is however observable, that the reason given for the existence of the above distinction, namely, the rent not being recoverable by the successor, has been removed by the statute 5. Geo. 3. c. 17., which makes leases of tithes and other incorporeal hereditaments by ecclesiastical persons, whether for *lives* or *years*, as good as if the same were of corporeal hereditaments, and gives an action of debt to the successor for rent reserved on freehold leases.^c It seems therefore to follow, that such leases of incorporeal

^b Rickman v. Garth, Cro. Jac. 173. Palm. 105. 175. Hardr. 526. Jewel's ca. 5 Co. Rep. 3 a. Talentine v. Denton, Cro. Jac. 3.; which overruled Jewel's ca. respecting the point of a lease for *years*. Ley, 76, 1 Keb. 63. 2 Ibid. 727. Dean and Chapter of Windsor v. Gover, 2 Saun. 304. Bally v. Wells, 3 Wils.

32. But leases for *years*, in conformity with the statute, may be made of tithes that have been usually letten, and will be binding upon the successor. See Co. Lit. 44 b. n. (3.) [17th ed.] Mo. 778. pl. 1078. 4 Bac. Ab. 191.

^c Co. Lit. 44 b. n. (3.) [17th ed.]

hereditaments, though for a freehold interest, would be treated as voidable only with respect to the successor.

So leases made by deans, and such other corporations sole as are considered to have the whole fee-simple and inheritance of their possessions vested in them, and which are not confirmed by the persons substituted by law for that purpose, are conclusive upon them during their whole time, and do not absolutely determine upon their death, but continue good until the successors come to avoid them.^d

But dispositions for a chattel interest by parsons, vicars, prebendaries, provosts in cathedral churches, and such other sole corporations as were presentative or collative and not elective, and were not considered to have in them the absolute fee-simple of their possessions, but a qualified fee-simple only, whether of things in livery or things in grant, if made without the confirmation of the patron and ordinary, &c., though they were binding upon the lessors themselves, yet upon their death or other avoidance became absolutely void, without the necessity of any entry or claim on the part of their successors; and such dispositions were consequently incapable of being affirmed by such successors.^e

If however such last-mentioned corporations had made dispositions for a freehold interest, the same did not become absolutely void upon their death or other avotion, but continued good until some act done by the successors to avoid them; they therefore were capable of being confirmed by such successors. And the reason assigned for this distinction was, because the estate of freehold not being capable of passing without livery of seisin, an entry by the successor was necessary to defeat such livery; and that therefore if he before entry confirmed the disposition, he could not afterwards avoid it during his time.^f And so

^d Bro. Ab. tit. Accep. pl. 10.; Ab. tit. Lease, pl. 18, 19. 33. 52.; tit. Lease, pl. 18. 33. Dy. 46. tit. Deane and Chapter, pl. 20.; tit. pl. (9). Co. Lit. 45 a, b., 341 a, b. Preb. pl. 1. Hetl. 88. 1 Rol. Rep. Hetl. 24. 361.

^e Dy. 46. pl. (9). Co. Lit. 45 a, b., 341 a, b. 3 Co. Rep. 65 a. Bro. Ab. tit. 5 Co. Rep. 65 a. Bro. Accep. pl. 26. Fitz. Ab. tit. Abbe,

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the law seems at the present day to stand with respect to the dispositions of such sole corporations as are last mentioned, whether with or without confirmation, unless protected by the above statutes.

And though the corporations sole or heads of the corporations aggregate be under the age of twenty-one years, their dispositions are voidable only.⁵

II. What the law is in application to dispositions made by spiritual corporations aggregate.

Leases, gifts, grants, and other dispositions made by a dean and chapter, master and fellows of a college, or other aggregate corporations affecting the corporate property, (except such leases as are warranted by the 13. Eliz. c. 10.,) are binding upon such corporate bodies during the time of the dean, master, &c., who are parties to such dispositions, they being the heads of the corporations, but are void or voidable at the election of the successors, on the death of him who was the head of the corporation at the time of the voidable disposition being made, notwithstanding that statute enacts, that all leases, &c., made by any of the persons or corporations therein mentioned, contrary to the tenor thereof, shall be utterly void.⁶

For where the master and fellows of a college by deed enrolled made a lease for years not warranted by the statute of 13. Eliz. c. 10., and afterwards suffered a fine and five years to pass without claim, though the lease and fine were held void against the succeeding master, yet they were held good against the college during the life of the master who was party to the lease and made no claim, he being the head and principal part of the corporation.⁷

But dispositions made by a chapter that hath no dean, if they do not comply with the requisitions of the statutes of

pl. 9. Dy. 259 b. 1 Rol. Rep. 160. 4 Bac. Ab. 118, 119. 4 Bar. & Al. 361. 2 Brownl. 165. Bridg. 94.

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⁵ 4 Bac. Ab. 121., and see references supra. 5 Co. Rep. 60 a. Magdalen College ca. 11 Co. Rep. 66 b. 69 b.

⁶ Co. Lit. 45 a., and n. (4.) ibid. 78 b. 1 Rol. Rep. 153. 155. 160. [17th ed.] 10 Co. Rep. 60 a, b. 162. 1 Leon. 307. 308. 2 Brownl. 154.

13. El. c. 10., are void ab initio; so likewise are dispositions made by other corporations aggregate which have no head.^j

And if a dean and chapter, master and fellows, &c. are all equally seized, and the dean or master solely makes a disposition; the same is said to be void ab initio at common law, though pursuant to the statute of 13. El.^k

III. By what successors an election to avoid or affirm voidable dispositions made by spiritual corporations sole or aggregate may be exercised.

The successor by whom voidable dispositions are capable of being avoided or affirmed must be perfect successor, and where he is the head of an aggregate body must be fully authorized by the corporation to effectuate the act of affirmation or avoidance; and he must be conusant of his title at the time of committing any act, which, had it been done with full knowledge of his rights, would have amounted to an affirmation of the disposition. These several points will appear more fully from what follows. As if the successor of a bishop, before he has a restitution of the temporalities out of the king, accepts the rent reserved by his predecessor upon a voidable lease; such acceptance will not be an affirmation of the lease, but the successor may still enter and avoid the same, because before restitution he is not perfect successor, and then such acceptance shall not bind him any more than if he was a perfect stranger.^l

And where the master of a college or head of any corporation aggregate accepts rent upon a voidable lease, without authority in writing from the corporation, this acceptance will not, it is said, affirm the lease during the life or continuance of such master or head; for that the right being as much in the fellows or other members of the

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^j 1 Mod. 204, 205. Co. Lit. 45 a. ^l Bishop of Oxford's ca. Palm. and n. (4.) ibid. [17th ed.] 174. 4 Bac. Ab. 123.

^k 1 Mod. 204. 2 Mod. 56.
1 Leon. 307. 308. 4 Bac. Ab. 119.

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college as in the master, &c., he cannot by his own act preclude them from their entry upon any voidable lease; and that he himself may enter to avoid such lease, notwithstanding his own acceptance of the rent.^m

IV. The commission of what acts by the successors of spiritual corporations sole or aggregate does and does not preclude an election to avoid or affirm voidable dispositions made by their predecessors; and in what manner the same may be avoided.

The first part of this inquiry has been partially anticipated by what has been already said; but it may be further observed, that though acceptance of rent upon voidable leases made by corporations sole or aggregate is the most usual mode by which such leases are rendered conclusive upon the successorsⁿ, yet there are several other ways whereby they may be affirmed; as by distraining for rent due at the death of the predecessor; or by bringing an action of waste against the lessee; or, in case the lease be for life or lives, by bringing an assize for the rent due after the death of the predecessor; or by acceptance of fealty from the lessee; the commission of any of which acts amounts to an affirmation of such voidable leases, and renders them good as against the persons affirming.^o

If the bailiff of a bishop without his direction receives rent upon a voidable lease made by the bishop's predecessor, this acceptance shall not bind the bishop. But where a bishop made a voidable lease for lives of certain land parcel of a manor, and died, and his successor was appointed, and the bailiff of the manor came to him, and showed him that there were certain rents in arrear of the said manor, and received his directions to receive them, which he did, and amongst the rest the rent upon the voidable lease, and afterwards paid all the rents to the

^m Magdalen College ca. 11 Co. ^o Dy. 239. pl. (40). Fitz. Ab. tit. Rep. 79 a. Abbot, 9. Bro. Ab. tit. Accep.

ⁿ Cro. Car. 96. Bro. Ab. tit. pl. 15. 4 Bac. Ab. 134. Accep. pl. 20.; tit. Lease, pl. 52. 3 Leon. 271.

bishop, without giving him notice particularly of that rent; this acceptance by the bailiff was held to be a confirmation of the lease by the bishop during his time.¹

It was said by Lord Mansfield in the case of *Jenkins v. Church*², that if a lease be merely voidable, the acceptance of rent alone, unaccompanied with any other circumstances, is not a sufficient confirmation: — that it cannot be a confirmation unless done with a knowledge of the title at the time, or unless the remainder man lies by, and suffers the tenant to lay out his money in improvements, in confidence of continuing tenant.

In regard to the manner in which the voidable dispositions under consideration may be avoided, it is said that where the same are of things corporeal, they may be avoided by entry³, where of things incorporeal, by claim⁴; and that where a lease for years is made, rendering rent, upon condition to be void for non-payment, a demand of the rent is necessary to avoid the lease.⁵

Where an entry is requisite, it must be made either by the party himself having the title of entry, or by his bailiff or other person properly authorised for that purpose, since a bailiff cannot, by virtue of his office, make an entry for his master for a condition broken without his express command to do so; that not being incident to his office as bailiff; and an entry being a thing which the master may or may not make, his bailiff shall not determine his election therein.⁶

Where the title of entry is in a corporation aggregate, their bailiff must be empowered to enter by deed, since their parol command in such case is void, and the entry thereupon tortious; because as a body politic they are

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corporations
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aggregate.*

In what
manner
they may be
avoided.

¹ H. 24. Wheeler and Danby, See Dy. 222, in *Ayer v. Orme.*
1 Rel. Ab. 478. cited C. 95. Sid. 7. in *Young and Wright.*

² Cowp. 483.

³ An actual entry to support an ejectment is now only necessary for the purpose of avoiding a fine with proclamations. See Dy. 222, in *Ayer v. Orme.* and see supra, p. 54. Mo. 52. in pl. 152. Dy. 222, pl. 21.

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 spiritual
 corporations
 sole and
 aggregate.*

invisible, and incapable of acts which natural persons are capable of.^v

And though the receipt of rent upon a voidable lease by the bailiff of a bishop will not, as we have seen^w, be binding upon the bishop, if done without his directions; yet a bishop may by parol command his servant to demand a rent and to make a re-entry, since, being a sole corporation, he is capable of the same acts as natural persons are.^x

SECTION 6.

Election considered in application to the dispositions of mortgagors.

**What dis-
 positions
 are voidable
 at election.**

Here we may inquire, what dispositions made by mortgagors without the concurrence of their mortgagees are voidable, and may be either avoided or affirmed at the election of the latter.

When a person has conveyed away his property in mortgage, he has no power either express or implied, without the sanction of the mortgagee, to effect any subsequent dispositions thereof not subject to every circumstance of the mortgage; but such dispositions are voidable only as against the mortgagee, and not absolutely void; they consequently call forth an application of the law of election^y; and the mortgagee may treat those claiming under such dispositions as trespassers, disseisors, or wrong doers, or not, at his election.^z

Therefore where a mortgagor, who had continued in possession after the date of the mortgage, made a lease of a warehouse for seven years, without the privity of the mortgagee, and whereof he had no notice, and of which

^v Dumper and Symms, 1 Rol. Ab. 514. Bro. Ab. tit. Corpor. pl. 50. 4 Bac. Ab. 125.

^w Supra, p. 130.

^x 4 Leon. 181. in Wood and Chiver's ca.

^y Pow. Mor. 157. n. (B.) [5th ed.]

^z Keech v. Hall, Doug. 21.

mortgage the lessee also had no notice; on ejectment brought by the mortgagee against the tenant, without previously giving him notice to quit, he obtained a verdict against him.^a

But the mortgagee may adopt such voidable dispositions of the mortgagor by confirmatory acts, and preclude himself from afterwards avoiding them; as if he is privy to the lease granted by the mortgagor, and encourages the tenant to lay out money, he cannot afterwards sustain an ejectment against him.^b

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Sect. 6.
*As to the
dispositions
of mortga-
gors.*

SECTION 7.

Election considered in application to the dispositions of disseisors, and others having wrongful titles.

Dispositions made by disseisors, and other persons whose titles are defeasible, affecting the estates of which they are in wrongful possession, are for the most part voidable only, and not absolutely void as against the disseisees or other rightful owners of the property, and may be either avoided or affirmed by them at election.

What dis-
positions
are voidable
at election.

For a deed of confirmation can, strictly speaking, operate as such with respect only to voidable estates, and not to those which are absolutely void.^c Now the estate acquired by a disseisor, and also estates created by him, are capable of being confirmed by the disseisee, and are therefore voidable only, since a disseisor always acquires by his disseisin a tortious fee simple, notwithstanding he may claim a less estate.^d

^a Keech v. Hall, *supra*.

^b Keech v. Hall, *supra*. If a mortgagor contracts to make a lease, the tenant has a right to say, "you shall either obtain the consent of the mortgagee, or redeem the mortgage; or if you complain of the hardship of this, you shall

rescind the contract." See Cos-tigan v. Hastler, 2 Scho. & Lef. 160. 166.

^c Co. Lit. 295 b. n. (1), [17th ed.] Gilb. Ten. 75.

^d Co. Lit. 296 b., and n. (1), *ibid.* 297 a., and n. (1), *ibid.* [17th ed.]

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As to the dispositions of disseisors, &c.

What acts committed by disseisors, &c. are conclusive.

Some acts indeed there are committed by disseisors and others having defeasible titles, which will be conclusive as against the persons to whom the right of property belongs, upon the ground of those acts being lawful, and such as they were compellable to perform: therefore admissions by disseisors, lords of manors, or others that have defeasible titles, to ancient copyhold lands, stand good against them that have the right, being lawful acts, and such as they were compellable to do.^a But their voluntary grants of such copyhold lands will not so bind.^b And if an assignment of dower be made by a disseisor or other wrong doer, and there be no covin, the same will be good unless it be prejudicial to the disseisee.^c But the assignment by a disseisor of rent out of land to a widow for her dower will not be binding upon the disseisee.^d

Of the voidable class of dispositions, which is by far the most comprehensive, an example is afforded by Lord Coke, by whom it is said, that if the heir of the disseisor grants a rent-charge, and the disseisee confirms it, and after recovers the land, he shall not avoid the rent-charge against his own confirmation^e: the reason for which seems to be, because the disseisee, having right to defeat the estate of the disseisor by his regress, in the same manner hath a right thereby to avoid a charge or a lease granted by the disseisor, which right for the time may be bound by his confirmation.^f And it seems it may be taken as a general rule, that such a thing as may be defeated by entry may be made good by confirmation.^g And if a disseisor makes a lease for life reserving a certain rent, and afterwards grants the reversion to the disseisee; if he afterwards accept rent of the lessee, he shall not oust him.^h

^a 4 Co. Rep. 24 b.

^j Popl. 51.

^b Co. Lit. 58 b.

^k Co. Lit. supra.

^c Ibid. 35 a. 357 b.

^l Dy. 50. in pl. 207. Ibid. 239.

^d Perk. s. 398.

in mar. note to pl. 41.

^e Co. Lit. 300 a.

SECTION 8.

Election considered in application to leases made by guardians in socage, and testamentary guardians.

Of the different denominations of guardians, such only as are styled guardians in socage, and testamentary guardians, it will be our business here shortly to speak of.

The title to the former species of guardianship can only arise, where an infant is seised of lands, or other hereditaments lying in tenure holden by socage; and it is said regularly to expire when the infant, whether male or female, attains fourteen; though some say, that this must be understood only where another guardian, either by choice of the infant or otherwise, is ready to succeed, and that the guardianship in socage continues in the mean time.^m

These guardians in socage are said to have not only a bare authority over, but also an interest in the lands of their infant wards during the continuance of the guardianship.ⁿ The consequence of which seems to be, that they are enabled to grant leases of such lands in their own names; and that if the duration of the term for which such leases are granted is not expressly measured by the continuance of the guardianship, and will not necessarily expire therewith, the same do not become absolutely void on the infants' coming of age, but are voidable only, and may therefore at the election of the infants be either avoided or affirmed.^o

The power of a guardian in socage to make leases is shown by a case, where a tenant in socage leased his lands for four years, and died, his heir being under fourteen, and the guardian in socage leased the same lands to the tenant for the term of fourteen years, before his former term was expired: and it is said to have been held by the Court,

What
leases made
by guar-
dians in
socage a
voidable.

^m See Co. Lit. 88 b. in n. (13), Jac. 55. 98. Bruden and Hussey, [17th ed.] 2 Rol. Ab. 41.

ⁿ Shaplane v. Roydler, Cro. 2 Bac. Ab. 138.

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leases of
guardians
in socage
and testa-
mentary
guardians.*

that if the acceptance of the second lease could not be properly called a surrender of the first for want of a reversion in the guardian, yet at least the first lease was determined by admittance of the lessor's power to make the second.*

Guardians in socage being now but seldom heard of, and dispositions so rarely made by them of the lands of their infant wards, enough has been said to show the application of the law of election to leases which are not made to determine with the guardianship.

But it should be observed, that in the case of *Roe v. Hodgson* ⁴ one of the points agreed upon is stated to have been, that a guardian in socage till an infant attained fourteen and a testamentary guardian are the same; and that therefore whatever interest the former has in lands till the infant is fourteen, the latter has until he is twenty-one; and it was broadly laid down, that the testamentary guardian of an infant could not make a lease of the infant's lands.

Yet it has been held in a more recent case ¹, that it is competent to a testamentary guardian to make a lease of the infant's lands to subsist during the minority; and the case in which this point was resolved seems to have been considered distinguishable from that of *Roe v. Hodgson*. Upon the whole, the question, whether the lease of a guardian in socage or testamentary guardian is absolutely void or only voidable, cannot be considered as entirely set at rest.

**Whether
lease by tes-
tamentary
guardian is
void or
voidable,
query.**

SECTION 9.

Election considered in application to leases made by adminis- trators durante minoritate.

An administrator appointed generally during the infancy of an executor or the next of kin seems to a certain extent

* 1 Leon. 158. 522. 4 Leon. 7. ¹ Shaw v. Shaw, 1 Vern. & Whillis v. Whitewood, *Ow.* 45. Scriv. 607.

⁴ 2 Wils. 129. 135.

to possess, during the period of the infant's minority, the same powers as an absolute executor. He may therefore during such infancy make leases of any term vested in the infant.^{*} But if the duration of such leases be not circumscribed by the attainment of the infant to the age when the power of the administrator ceases, the same do not so absolutely determine upon that event as to be rendered incapable of being kept on foot, but it rests with the infant, on his attaining that age, either to adopt the lease so made by the temporary administrator by acquiescing therein, or at his election, by his entry on the property leased, to avoid the same.

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leases of
administrators
durante
minoritate.*

What leases
made by
administra-
tors durante
minoritate
are void-
able.

Therefore where an administrator during infancy generally made a lease for ten years, the same was held good until the infant executor attained seventeen years, and, as it seems, until he entered.^t

But by the statute of 38. G. 3.^u, the powers of administrators appointed during the minority of sole infant executors were extended, it enacting, that no probate should be granted to an infant executor until he attained twenty-one, thereby consequently depriving him during his infancy of the ability of exercising an election to avoid or affirm such acts done by the administrator, as he might before have avoided or affirmed on arriving at the age of seventeen; — and the person, to whom such administration during infancy should be so granted, was invested with the same powers as an administrator durante minoritate of the next of kin then had.

SECTION 10.

Election considered in application to the dispositions of copyholders.

All dispositions effected by copyholders of their estates beyond the term of a year, unless sanctioned by the lord's

* See Toll. Ex. and Ad. 405. Moyle Finch's ca.; and see Prince's

^t 6 Co. Rep. 63 b. 67 b. in Sir ca., 5 Co. Rep. 29 b.

^u c. 87. ss. 6, 7.

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 dispositions
 of copy-
 holders.*

licence, or warranted by the custom of the particular manor, and other acts of commission and omission inconsistent with the relation subsisting between lord and tenant, work a forfeiture of the copyhold interest.^v

Of these several dispositions and acts which operate as forfeitures of the copyhold interest, some there are, whereupon no election arises on the part of the lord either in taking advantage of the act of forfeiture, or in waving the same, since they are immediate forfeitures, and extinguish the copyholder's estate, without any act being necessary on the part of the lord to the consummation of the forfeiture; while there are others, which, although they operate as a forfeiture, yet are not of that forcible nature as to preclude their capability of being dispensed with by the lord.^w

If therefore a copyholder alienates his estate by recovery or fine, accompanied as it should seem with a change of possession, or by feoffment with livery, such conveyances operate as an immediate extinguishment of the copyhold interest, and the forfeiture created by them cannot be waved by the lord. But if a copyholder makes a lease of his copyhold estate beyond the term of a year, not warranted by the custom of the particular manor, or commits voluntary or suffers permissive waste thereon^x, these acts, though they constitute a forfeiture, yet not possessing the tortious character of those first mentioned, are capable of being dispensed with, and therefore are alone the subject of election.^y

What dispositions and acts working forfeitures are susceptible of election.

When election must be made.

And when such a forfeiture is committed by the tenant of a copyhold estate as does not per se extinguish the copyhold interest, an election to take advantage of or to wave the forfeiture must it seems be made during the life of the lord in whose time the same was committed, and is incapable of being exercised by his heirs after his death.

^v *Scriv. Cop. 494. et seq. [2d ed.] Kitch. 113.*

^w *Eastcourt v. Weekes, 1 Lutw. 799. 1 Freem. 516.*

^x *Powel J., in Eastcourt v. Weekes, seems to have thought, Co. Lit. 63 a. n. (1), [17th ed.] Scriv. Cop. 492. et seq. [2d ed.]*

that voluntary waste was a determination of the estate, but not permissive, though the latter was a forfeiture. And see *Godb. 47.*

Thus, where the tenant for life of a copyhold demised his estate for one year, and so for ten years, and suffered permissive waste thereon; by which acts he incurred a forfeiture, and at the time of his so doing the manor belonged to two sisters in coparcenary, and after the decease of one of them, the survivor, who thereupon became entitled to the entirety, brought ejectment against the widow of the copyholder by whom the forfeiture had been committed; judgment was given for the defendant by the opinion of three justices against one, chiefly because, that although the lease and waste were forfeitures, yet they were not such forfeitures as determined the copyhold estate; and that then it was in the election of the lord to take advantage of the forfeiture at that time or not; but that if he did not, his heir should have no such election, and then the election, in the case before the Court, ought to have been executed in the life of the other coparcener; and that no entry could be made for a moiety, for they were but one heir.^a

If the forfeiture of a copyhold be effected by an act which operates instanter by extinguishing the estate, and consequently leaves no room for election, and the lord entitled to the manor pro tempore be tenant for life only; if he omit taking advantage of the act of forfeiture, such omission will not be prejudicial to the lord in remainder on his estate falling into possession, since he had an interest in the manor at the time of the forfeiture.^b But where the forfeiture is committed by an act, which leaves it open to the election of the lord whether he will construe it as such, or waive the same, the law has been considered to be otherwise, and that therefore the conduct of the lord pro tempore will be conclusive upon the lord in remainder: but the act of the lord pro tempore will not so bind those entitled to the manor in remainder or reversion as to give effect to the grant of a common law interest.^c

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dispositions
of copy-
holders.*

Conduct of
lord pro
tempore,
when bind-
ing upon
those in
remainder.

^a Eastcourt v. Weekes, 1 Lutw. 799. 1 Freem. 516.

^b See Scriv. Cop. 517, 527, 528. [2d ed.], and authorities there cited.

^c Co. Cop. s. 60. tr. 139. Gilb. Ten. 249. 354.

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dispositions
of copy-
holders.*

Forfeitures admitting of election may be dispensed with.

To render act of dispensation available, lord must be conusant of forfeiture.

But of some acts lord will be presumed to have had knowledge.

Acts of dispensation.

Such forfeitures of copyhold estates as admit of an election on the part of the lord may be dispensed with, and his election to waive or take advantage of the act of forfeiture be consequently precluded, by the commission of certain acts on his part demonstrative of an intention to keep on foot or discontinue the copyhold interest.

But in order to render an act of dispensation available, it is requisite that the lord should be conusant of the cause of forfeiture; for if in ignorance of any forfeiture having been committed he do an act, which, had he possessed full knowledge of the same, would have amounted to a dispensation thereof, he will not be precluded from taking advantage of the forfeiture.^c

Some acts however there are of which the lord will be presumed to have full knowledge, as, for instance, failure of suit of court, non-payment of rent, &c.^d

Numerous and diversified are the acts on the part of the lord by which forfeitures may be dispensed with, since it appears that any act of recognition will preclude him from taking advantage of a forfeiture.^e

To enumerate a few instances among many, it appears that acts of dispensation may be effected by the re-admission of the copyholder who committed the forfeiture; or by the admittance of his heir; or even, as it should seem, by the presentment of the death of him who committed the forfeiture, such presentment being an acknowledgment of him as tenant; or by the amercement of him for non-appearance; or by the acceptance of a surrender from him, or of rent or services, or by distraining for either.^f

And things of the same nature with the above, and equally solemn on the part of the lord, will have the same effect, and will shew that the lord dispenses with the forfeiture, and means that the tenant shall still continue in his tenancy.^g

^c *Scriv. Cop. 527. [2d ed.]*

^d *Ibid.*

^e See 3 T. R. 171. in *Doe v. Hellier*.

^f See 1 Keb. 15., per *Twisden J.*

^g See in *Doe v. Hellier*, *supra*.

Such acts as constitute a waiver do not of course operate as a new grant, but admit the tenant to be in of his old title.^b

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dispositions
of copy-
holders.*

And if the lord, after a lease for years by a copyholder without licence, makes a feoffment or a lease for years of the freehold of this copyhold to another, the feoffee or lessee cannot take advantage of the forfeiture, the lease or feoffment of the lord before entry being an assent in the nature of a confirmation to the copyhold lease.^j

The observation made by Lord Kenyon respecting the acceptance of rent dispensing with a forfeiture should be borne in mind, namely, that acceptance of rent is of an ambiguous nature; that the possession of the tenant may remain though his former estate is gone, and that there the rent may be accepted from him under a tenancy from year to year; that therefore an act of that kind shall not be binding upon the lord as a waiver of the forfeiture.ⁱ

*Acceptance
of rent does
not neces-
sarily waive
a forfeiture.*

^b See Milfax v. Baker, 1 Lev. 26. ^j See in Doe v. Hellier, *supra*.
ⁱ Penn v. Merivall, *Ow.* 65.

CHAP. IV.

**ELECTION CONSIDERED IN APPLICATION TO DOWER AT
COMMON LAW, AND JOINTURES UNDER THE STATUTE
OF 27. H. 8. c. 10.**

By the common law, a widow, after the decease of her husband, is entitled to be endowed of the third part of such lands and tenements whereof he was seised in fee simple, fee tail general, or as heir in special tail, at any time during the coverture; to hold the same in severalty by metes and bounds, for the term of her life.^a

Where widow shall elect to be endowed of one seisin or another.

Cases however may arise, where, in consequence of there having been two seisins in the husband in fact or contemplation of law of the same estate at different times during the coverture, the widow shall not be endowed out of both the seisins, but shall have election to be endowed of the one seisin or the other.

To the perfection of this dower at common law, it was necessary that the same should consist either of some part of the land whereof the widow was dowable, or of a rent or some other profit issuing out of the same; and, (independently of statutable and equitable interposition, and with the exception of dower ad ostium ecclesiae and ex assensu patris,) an assignment of other lands in which she had no title to dower, or of a rent issuing out of such other lands, was no bar thereof; for by the rule of the common law, a right or title which any one had to lands or tenements of any estate of inheritance or freehold could not be barred by acceptance of any manner of collateral satisfaction or recompence.^b

Acceptance of dower against

But yet it was and still is competent to the widow to preclude herself from an assignment of dower according

^a Lit. s. 36.

^b 4 Co. Rep. 1 a b. Co. Lit. 34 b.

to common right, by accepting an assignment thereof against common right: and the principle upon which the courts of common law have founded themselves, where they have held a widow precluded from claiming an assignment of dower according to common right after an assignment accepted by her against common right, appears to be that of election, a principle somewhat analogous to, but much less extensively acted upon than that adopted by courts of equity.

The statute of jointures^c made an inroad upon the common law principle that a freehold right could not be barred by acceptance of collateral satisfaction, and also gave rise to a new species of election, wherewith it invested the jurisdiction of the courts of common law, by giving the widow liberty, in the case of jointures made after marriage, except by act of parliament, either to adopt such jointures, or resort to her dower. It is proposed in the present chapter to consider the subject of election with reference to dower at common law, and jointures under the above mentioned statute.

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common
right will
preclude
assignment
of it accord-
ing to com-
mon right
on footing
of election.

Statutable
election
upon join-
tures made
after mar-
riage.

SECTION 1.

In what cases a widow has election to be endowed of one seisin or another at common law.

Sometimes a widow may choose to be endowed of one land or other land, or of a seigniory or tenancy, or of land or of a rent-charge or rent seek issuing thereout.^d But in such cases she shall not have dower of both, except in special cases. As if a man, seised of one acre of land in fee, takes a wife, and exchanges the same acre with a stranger for another acre, and the exchange is executed, and the husband dies; the wife may elect to have dower of the acre which the husband gave in exchange, or of the

Cases
wherein
widow may
elect to be
endowed
out of one
of several
seisins.

^c 27. H. 8. c. 10.

^d Perk. s. 318.

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to dower.

acre which he took in exchange, but she shall not have dower of both acres.^c

So it is said by Lord Coke, that the husband may be seised in his demesne as of fee absolutely, yet the woman shall not be endowed, as she shall not be endowed both of the land given in exchange, and of the land taken in exchange; and yet the husband was seised of both; but she may have her election to be endowed of which she will.^d

And if there be lord and tenant by fealty and twelve-pence rent, and the lord takes a wife, and purchases the tenancy in fee, and dies, the wife shall be at liberty to be endowed of the seigniory, or of the tenancy.^e So if a man, seised of a rent-charge in fee, takes a wife, and purchases the land in fee whereout the rent is issuing, and dies; the wife may elect to be endowed of the land or of the rent.^f

But if there be lord and tenant by fealty, and the lord takes a wife, and the tenancy escheats to the lord, who enters and dies; the wife may not elect to have dower of the seigniory or of the tenancy, but she will be forced to take her dower of the tenancy; because the seigniory is determined during the coverture by act of law; and it is no disadvantage to the wife to be endowed of the tenancy, for if she be put out of possession of part thereof by a more ancient title, the seigniory will be revived for so much; and if all the tenancy be recovered by a more ancient title, the seigniory will be revived in all, and then she may have dower of the seigniory.^g

Again; — if a husband, seised of land in fee, make a feoffment thereof to a stranger in fee, rendering to him and his heirs 3s. rent, with clause of distress, and die, and the feoffee endow the wife of the feoffor of a third part of the land; she shall hold it discharged of the rent, and the whole rent shall issue out of the residue of the land; because the wife shall be endowed of the best possession which her husband had during the coverture; and the

^a F. N. B. 149. (N). Perk. s. 319.

^b Co. Lit. 31 b. ^c Leon. 271.

^d 2 Bac. Ab. 378.

^e Perk. s. 320.

^f 2 Bac. Ab. 378.

^g Perk. s. 321.

husband was seized of the land during the coverture discharged of the rent.¹ And yet because he had also an estate in the rent during the coverture, it seems the wife may be endowed of that if she think fit, and waive her dower of the land: but the rent reserved on the feoffment is no more a bar to her to demand dower of the land, than if none at all had been reserved, if she chooses the land.²

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to dower.*

To the foregoing positions it may be added, that if a woman be endowed, and afterwards loseth by action tried; if she pray in aid of him in the reversion, she shall be new endowed of that which remaineth, and shall have election to be endowed of what part thereof she will.³

SECTION 2.

As to that assignment of dower against common right, the acceptance of which will preclude a widow from enforcing an assignment according to common right.

I. The acceptance of what assignment will preclude.

If a woman hath right to have dower of lands, tenements, rents, commons, and such like, parcel of the same thing may be assigned unto her in the name of dower; and it is not necessary that the third part of the thing to which she hath right of dower be assigned unto her, for if the fourth part, the fifth part, or the moiety be assigned unto her in the name of dower for all the freehold which her husband had, and she agree thereunto, it is sufficient, and a good assignment.^m

What assign-
ment of
dower
against
common
right will
preclude an
assignment
according
to common
right.

Though the specific dowers of ad ostium ecclesie and ex assensu patris have long fallen into disuse, and probably on account of the peculiar property belonging to them about to be mentionedⁿ; yet it may be here noticed, that if a

¹ Perk. s. 324.

^m Perk. s. 405.

² 2 Bac. Ab. 378.

ⁿ 2 Bl. Com. 135.

^l F. N. B. 149. M.

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*Election as
to dower.*

woman after the death of her husband had entered and agreed to either of these species of dower, she was precluded from claiming any dower by the common law; but she might have refused either of such dowers, and been endowed after the course of the common law.^o

Therefore if a woman be dowable of three manors, and accept of the heir one of those manors in lieu of dower in all the rest; this is good though against common right, which gives her but the third part of each manor.^p

And where a woman recovered dower, and the sheriff upon the writ to put her in possession returned that he had delivered to her eighty-four acres of the land mentioned in the writ; whereupon she brought a scire facias against the tenant, suggesting that the sheriff had assigned sixty acres of the eighty-four of the land of a stranger not comprised in the record, and contended she ought to have a new division; and the tenant pleaded that the other twenty-four acres were parcel of the land recovered, and that the plaintiff had entered and accepted the same: upon demurrer it was adjudged for the defendant, because the plaintiff was barred by the acceptance of and entry into the twenty-four acres, though less in quantity than the third part of all in the record.^q

From the case last cited, it appears that an entry by the widow upon the property assigned to her against common right is necessary to render such species of dower conclusive upon her, and that her bare consent to accept the same is not sufficient.

Dower ac-
cording to
common
right how
perfected.

To the perfection of dower according to common right, the same must be assigned either by the sheriff, by the king's writ, or by the heir or other tenant of the land by consent or agreement. And where the husband was sole seised, the assignment, if made by the sheriff, must be in severalty by metes and bounds. But an assignment to the widow by the heir in common, and not by metes and

^o Lit. s. 41. Co. Lit. 36 a.b. 683. 2 New Rep. 33. Co. Lit.

^p 2 Bac. Ab. 374. 1 Rol. Ab. 32 b. n. (2), [17th ed.]

^q Mo. 679. p. 928.

bounds, will be conclusive upon her if she assent thereto, though it would have been error if the sheriff had so assigned.

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Thus where A. seised of land in fee married, and afterwards devised for twenty-one years to B. and died, and the heir assigned to the widow a third part of the land for her dower, without setting it out by metes and bounds, and she accepted it in satisfaction of her dower; it was held, that although the widow was not bound to accept in common, without the land being set out by metes and bounds, nor the heir bound to assign it but by metes and bounds for the prejudice that might accrue to them to occupy it in common; yet inasmuch as the third part in common was due by law, and they both consented to accept it according to law, they might by their consent waive the assignment by metes and bounds, which was only for their own advantage, and accept it as it was due by law; and that though the lessee for years did not agree thereto, yet the assignment of the tenant of the freehold bound him.

Style reports the last case¹ as having come before the Court in the shape of a special verdict upon these words, viz., "I endow you of a third part of all the lands your husband died seised of;" and that the question was, whether the feme was well endowed, because the heir did not say that he endowed her by metes and bounds: — and that Rolle C. J., with the concurrence of Nicholas and Ask justices, said, that of common right a feme ought to be endowed by metes and bounds, where the sheriff assigned dower, who was an officer of the law, and ought to prevent incumbrance and disputes; but that it might be assigned generally of the third part in some cases, and that the parties might agree against common right, and that there both parties agreed to take dower in that manner: — that Jerman J. said, if dower were of a third part, it ought to

¹ Co. Lit. 32 b. 34 b., and n. (1), ² Vin. Ab. tit. Dower (X), pl. 3.
ibid. [17th ed.] ³ Booth v. Lambert, Sty. 276.

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to dower.**

be by metes and bounds generally; but if of a moiety, it was not so, or if the parties consented it should be otherwise: — and that Rolle added, if the sheriff assigned dower, and did it not by metes and bounds, it was error if it might have been so assigned; and that where a feme could not be endowed by metes and bounds, she might enter without assignment.

**What rent
will bar
dower
according
to common
right.**

If the subject of an assignment of dower against common right consist of a rent out of the dowable estates, it must be for the life of the widow at least; for if it be limited to her for years only, or for the life of another, she will not be barred of her dower according to common right.

For where in dower the case was, that a baron being seised in fee of certain estates devised part thereof to his heir in tail, and suffered the fee in the residue to descend upon him; and the heir upon his father's death granted to the defendant an annual rent-charge of 50*l.* out of the said estates for her life, if the grantor or any son of his body so long lived, in recompence of her dower; and the deed of grant contained a clause, whereby it was agreed, that if the defendant was disturbed in the enjoyment of the rent, she might demand her dower as if the deed had not been made; and the heir had a son, the tenant, and died: — on demurrer, the Court, (allowing that the issue might have avoided the charge, upon which point a difference of opinion seems to have prevailed,) held the defendant bound by acceptance of the rent, because it had continuance, and issued as well out of the fee-simple as the entailed estates. And it was said, that if the rent had been assigned out of the entailed estates alone, and supposing the issue might have avoided and did avoid the rent, the defendant should have had her dower, notwithstanding the assignment, and that such was the law in the case of rent assigned out of land, the title to which was defeasible, whereby the rent was avoided: but that so long as the rent continued, the feme should be barred of her dower. And it was further said, that if a feme accepted a rent for years in allowance of her dower or for the life of another, the

same would not bar her of her dower, since they were not like estates in dower, which were for the life of the feme.^a

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to dower.*

It is reported to have been said by Dyer C. J., that if a husband alien parcel of his lands during coverture, and die, and the heir enter upon the residue, and allow his mother parcel of the lands which remain in recompence of all her dower; on action of dower brought against the alienee of the other lands, he shall plead this assignment, and bar her of her dower: but that if the executor of the husband had assigned to the widow parcel of the lands aliened in recompence of her dower, neither the heir nor the other feoffees of the husband could have pleaded this. And a plea of rent having been received in full recompence of dower out of all the lands which belonged to the husband during marriage seems to have been thought a good bar, but not if it was granted out of other land.^b

And where in dower the tenant pleaded that he had assigned to the widow in name of recompence of her dower twenty acres of wheat out of the land of which she was dowable, it was held a good bar, as well as a rent or any other profit out of the land, as common of pasture for two cows: but it was said, that an assignment of sheep, or a horse in allowance of dower, was not good, they not being of the nature of land.^c

By what
other things
such dower
will be
barred.

A widow is entitled to hold her dower, assigned according to common right, discharged of all incumbrances created by the husband after marriage, since her title has relation to the marriage and seisin of the husband, which were prior to the incumbrances: but if she accept of the heir an endowment against common right, she shall hold it subject to any charges thereon, though created subsequently to the period at which her right of dower attached.

Dower
according
to common
right how
held;

against
common
right how
held.

So Lord Coke says, the endowment by metes and bounds according to common right is more beneficial to

^a Bickley v. Bickley, And. 287.

^x Mo. 59 pl. 167. Dy. 91. marg.

^b See Mo. 25, 26. in pl. 86.

n. (12).

^c Turney v. Sturges, Dy. 91 a.
pl. 12.

CHAR. IV. the wife than to be endowed against common right, for
Sec. 2. there she shall hold the land charged in respect of a charge
Election as made after her title of dower.
to dower.

If then a husband, seized of three manors in fee, grants a rent-charge out of all, and dies, and the wife has one manor assigned to her by the heir in lieu of dower of all the three manors; now two parts of this manor will remain charged to the distress of the grantee, because as to the two parts, she took her dower against common right, by which she ought to have had the third part of each manor. But if in this case she had recovered her dower, and such assignment had been made by the sheriff, she should have held it discharged; for when the assignment was made by the sheriff of one manor in allowance of all the manors, the grantee might distrain for the whole rent in the other two manors, and in every part of them, and it should not be more prejudicial to the heir this way than the other way.^z

Again, if a man seised of lands in fee take a wife, and grant a rent-charge, and afterwards make a feoffment in fee, and take back an estate tail, and die, and the wife recover dower against the issue in tail by redition, and make a surmise that her husband died seised, and pray a writ to inquire of the damages, which is granted to her; she will hold the land charged with the rent-charge, for by her prayer she accepteth herself dowable of the second estate, for of the first estate whereof she was dowable her husband died not seised, and so she hath concluded herself; wherefore, (saith Lord Coke,) if the rent-charge be more to her detriment than the damages beneficial to her, it is good for her in that case to make no such prayer.*

It may be observed, that where a widow is dowerable by custom, as in the county of Kent, where by the custom of gavelkind she is entitled to a moiety of her husband's estate so long as she keeps herself sole and without child, she cannot waive such customary estate, and take her thirds for life.^b

**Customer
lower not
wavyable.**

^a Co. Lit. 53 b., and see n.(2),
ibid. [17th ed.] ^b Co. Lit. 53 a.
^c Ca. Lit. 55 b. 111 a. Rob. Gav.

* *Perk.* ss. 330. 332., and see 230.
s. 331. *ibid.* 1 *Rol. Ab.* 683. Co.
Lit. 173 a.

And where this custom was pleaded, three justices held the plea good, and that the widow had not election to recover dower by the custom or by the common law. And it was said to have been accordingly so adjudged in dower between *Dowers & Celby* in the common bench.^c

II. The acceptance of what assignment of dower against common right will not preclude an assignment according to common right.

In *Vernon's case*^d it was resolved, that no collateral recompence made to a wife in satisfaction of her dower was a bar thereto at common law; the reason assigned for which was, that no right or title of freehold or inheritance could be barred by any collateral satisfaction, but only by release or confirmation, or some tantamount act. Therefore if lands, whereof a woman has no right to be endowed, or a rent out of such lands, be assigned to her in lieu of dower, yet this is no bar to her to demand her dower; for she having no manner of title to those lands cannot without livery and seisin be any more than tenant at will, which is no sufficient recompence for an estate for life, which her dower was to be.^e

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*Election as
to dower.*

What as-
sign-
ment of
dower
against
common
right will
not pre-
clude an
assignment
according
to common
right.

And an assignment of dower against common right must be absolute and unconditional, and not subject to any limitation.

Not a con-
ditional
one;

For where in dower^f the tenant pleaded that he by indenture granted a rent out of the dowable land to the defendant in recompence of her dower, and the defendant confessed the grant of the rent and her acceptance, but said that in the same indenture was a condition, that if the rent was not paid within such a time after it became due, the same should cease, and the indenture be void, and showed a breach; upon demurrer it was adjudged for the defendant, because the indenture was pleaded as a grant and not an assignment, and also because it was upon con-

^c Mo. 260. pl. 408.

^d 4 Co. Rep. 1 a b. in first reso- Cro. El. 451. 1 Rol. Ab. 684. Co. lution: Lit. 34 b. 2 And. 30, 31. Noy. 55.

^e Perk. s. 407. Co. Lit. 34 b.

4 Co. Rep. 1 b. 2 Bac. Ab. 374.

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*Election as
to power.*

**nor for a
chattel
interest.**

dition, for that rent assigned in recompence of dower, and which came in lieu of the land, ought to be as absolute as the assignment of the land itself; and that therefore the condition annexed was void, or if it should be good, yet that it was only annexed to the deed as a grant; and that upon breach of the condition the defendant was restored to her writ of dower. And it was said, that the grant ought to have been pleaded by the words "quod assignavit," (or in other words, "that he assigned"). And it was also said in the same case, that if an assignment and grant of land were made to a feme for a term of years in recompence of her dower, this would not bar her, because of this she was not tenant in dower, nor had she such estate as she would have had if she had been endowed, viz. an absolute estate for life.⁵

And where in dower the defendant said, that he himself before the writ brought did assign a rent of 10*l.* per annum to the demandant in recompence of her dower; upon which the demandant did demur, for that the tenant had not showed what estate he had in the lands at the time of granting the rent, as to say, that he was seised in fee, and granted the said rent, so as it might appear to the Court upon the plea, that the tenant had a lawful power to grant such a rent; the cause was allowed by the whole Court, and the demurrer holden good.^b

SECTION 3.

In what cases, since the statute of jointures¹, a widow may elect to take a provision under the statute, or her dower at common law.

**Jointure no
bar of
dower at
common
law.**

A jointure was no bar to a widow of her dower at common law, since a right or title to a freehold could not be barred by acceptance of collateral satisfaction.

And see Hob. 153.

¹⁴ Beamont v. Dean, 2 Leon. 10.
pl. 15. Dv. 361, pl. 11.

ⁱ 27. H. 8. c. 10; ss. 6, 7, 8, & 9.

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*Election as
to jointures.*

If therefore a person in consideration of marriage made an estate of lands to his intended wife, in full satisfaction of all the dower which after marriage might accrue to her in any of his lands, and they afterwards intermarried; or if a husband after marriage purchased to him and his wife for life, or in tail, in satisfaction of dower; neither of these provisions was a bar of her dower at common law: in respect to the first supposed case the reason was, because she had no title of dower at the time of the acceptance of the satisfaction, but it accrued after; another reason, and which applied itself as well to the secondly supposed case, was, because no collateral satisfaction could bar a right or title to any inheritance or freehold.

Before the passing of the statute of jointures, the greater part of the land in England was conveyed to uses; and as a wife was not dowlable of uses, her father or friends upon her marriage procured the husband to take an estate from the feoffees, or others seised to his use, to him and his wife before or after marriage, for their lives, or in tail, for a competent provision for the wife after her husband's death: then came the statute which transferred the possession to the use, by which the husbands were seised accordingly; and consequently if further provision had not been made, the wives would have had as well their dowers as their jointures.

*Jointures
why intro-
duced.*

To remedy such a consequence therefore was the object of the legislature, and this it accomplished by the statute under consideration, which enacted ^k, that where purchases or conveyances had been or should be made of any lands tenements or hereditaments to or to the use of the husband and wife and the heirs of the husband, or the husband and wife and the heirs of their two bodies begotten, or the heirs of one of their bodies, or the husband and wife for term of their lives; or the life of the wife, for her jointure; in such case every woman married, having such jointure made, should not claim nor have title to dower of the

^j 4 Co. Rep. 1 b. 2 a.

^k s. 6.

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to jointure.

residue of the lands tenements or hereditaments that at any time were her said husband's by whom she had any such jointure. And it was provided¹, that in case of evictions from her jointure or any part thereof, without fraud, by lawful entry or action, or by her husband's discontinuance, she should be proportionably endowed of the residue of his estate whereof she was before dowable. And it was also provided², that in case the jointure was made after marriage, except by act of parliament, she should be at liberty, after her husband's death, to refuse such jointure, and to resort to her dower at common law.

Statutable
election as
to jointure
after mar-
riage.

Copyhold
property
not within
statute of
jointures.

It is observable that this statute does not extend to copyhold lands, all the clauses therein expressly relating to dower at common law; and for freebench no writ of dower lies, being only an excedent interest out of the husband's estate.³

It will be seen that five different modes are mentioned, in the sixth section of the statute whereby a feme may be barred of her dower; but those several limitations of estates are given for example only, and do not exclude other estates of the like effect, and agreeing with the spirit of the statute.⁴

Conse-
quences of a
jointure not
according
with the
statute.

If then a jointure be made on a feme in a way not according with the intent of the statute, she will not be concluded by it, but will at law be permitted not only to enjoy the provision intended for her jointure, but also her dower; for since the statute has not been complied with, the state of things will be the same in the eye of a court of law as if the statute had not been passed: and it seems to follow that the same consequences will result in cases where the jointure is made during a state of coverture, and is not sustainable as such under the statute, even though such jointure be accepted by the wife. These observations lead us to make the following inquiries:—

¹ s. 7.

² s. 9.

³ Cro. Car. 44. 4 Mod. 85. And see 1 Ves. sen. 54. in Walker v.

Walker. ² Ibid. 257. in Riddgen v. Vallier.

⁴ 4 Co. Rep. 2 a.

I. What does and does not constitute a good legal jointure. Chap. IV.
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to jointures.

II. The commission of what acts by the wife after her husband's death will be deemed an acceptance of a jointure made after marriage, so as to preclude her election to waive the same, and resort to her dower.

III. The commission of what acts will not so preclude.

I. The first inquiry may be made by considering the several requisites to constituting a good jointure; and this will apply as well to a jointure made before, as to one made after marriage; only it will be borne in mind, that a jointure made after marriage requires the subsequent ratification of the wife to make it binding upon her. What con-
stitutes a
good joint-
ture.

And *first*, the jointure must take effect immediately on the death of the husband.

Therefore where a husband covenanted to stand seized to the use of himself in tail, remainder to his wife for life, and afterwards died without issue, the provision for the wife was held to be no jointure; for since it could not be said to be a jointure at the beginning, whatsoever happened afterwards should not make it such.³ And if a husband settle an estate to the use of himself for life, remainder to the use of A. for life, remainder to the use of his wife for life for her jointure; or with the first limitation to the use of A. for life, remainder to the use of the wife for life, for her jointure; in neither of these cases is this jointure good within the statute, though A. should die in the lifetime of the husband, and after the death of the husband the wife should enter; because at the time the limitations were made, they were out of the statute, it being uncertain whether the estate of the wife would take effect immediately on the death of the husband, as by the statute it ought; and no subsequent event could make them within it, for *quod ab initio non valet, tractu temporis non convalescit*⁴; but in each case the wife will be entitled to have her dower of

*It must
take effect
immedi-
ately on the
husband's
death.*

► *Wood v. Shirley*, Cro. Jac. 489. ³ 4 Co. Rep. 2 b. in Vernon's ca. Co. Lit. 36 b. Hob. 151. And see Sherwell's ca. Hat. 51. Winch, 33.

CHAP. IV. the residue ; for if the statute doth not bar her, the common
Sect. 3. law will not conclude her in such case of her dower.
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It must be for the wife's life;

Secondly, the jointure must be for the life of the wife or other greater estate, and not pour autre vie, or for any term of years or other smaller estate¹; for an estate to her for the life or lives of one or many others, or for a hundred or a thousand years if she live so long, or without such limitation, is no bar of her dower, though expressly made in satisfaction of dower, such estates not being within the statute.

or during her widowhood.

If then a husband make a settlement to the use of his wife for another's life for her jointure, this is not within the statute; for the estate is not for the life of the wife, and may determine without her act or default during her life, and so she may be destitute of a livelihood.² But if he make such settlement to the use of himself for life, remainder to the use of his wife absolutely or during widowhood for her jointure, that is an estate for her life, and cannot determine without her own act, and therefore is a jointure within the statute, notwithstanding all the examples contained therein are of a joint estate made to the husband and wife, and none of them to the wife only, nor by way of remainder; for the effect to the wife is the same, whether the estate be limited to the husband and wife for their lives, or to the husband for his life, remainder to the wife for her life, one estate being as beneficial to the wife as the other.³

So where the father of intended husband, in performance of articles of marriage to be had between his son and E., made a feoffment to the use of E. for life; and afterwards the marriage took effect, and the father died, and then the husband died: on the question whether E. should have the land settled, and also dower out of the other lands of her baron, the opinion was that she should be barred of her dower.⁴

¹ Sid. 5, 4.

² 4 Co. Rep. 2 b. 3 a. Hob. 40. 4 Co. Rep. 2 b.

³ 4 Co. Rep. 2 a.

⁴ Ashton's ca. Dy. 228. pl. 46.

And where lands were limited to a baron and feme, and the heirs male of their two bodies; the estate acquired by the wife was held to be within the intent of the statute, though not one of the five estates put for example therein, and to be a good bar of her dower.

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to jointures.*

Again, where A. made a feoffment, upon condition to enfeoff his son and M. his son's wife in tail, remainder to the right heirs of the feoffor; and the feoffment was made, and the son died: the estate acquired by M. was held to be a good jointure within the statute, and to bar her demand of dower, though she claimed by the feoffees and not by the ancestor. But a bargain and sale upon confidence to make a jointure was said not to be within the statute: though it was said, that if lands were given to a man and such a woman before marriage in name of jointure, and then they intermarried, this was within the statute.

In a case where by settlement before marriage the limitation of an estate to take effect after marriage was to the use of baron and feme and their heirs; this was held a good jointure and within the equity of the statute by three justices against two.^x

It is indeed laid down by Brooke^y, that where a husband makes his feme joint purchaser with himself after the coverture of any estate of freehold, this is a bar of dower if she agree to the jointure after his death; but that it is otherwise of the fee-simple, for that such jointure was not mentioned in the statute. But in *Vernon's case*^z this is said to have been misreported; and it is there observed, that the reason assigned by Brooke why a fee-simple was no jointure was not good in law, an estate in fee-simple being within the express letter of the statute; for that the words of the proviso^a were, "for term of her life or otherwise in jointure," which word "otherwise" extended to all other estates conveyed to the wife not mentioned before in

^v 4 Co. Rep. 2 b. Dy. 97. pl. 48.

^y Bro. Ab. tit. Dower, pl. 69.

^w Mo. 28. pl. 91.

^b See 2 Co. Rep. 5 b.

^x See Maurice Dennis's ca. Dy. 248; pl. 78.

^a s. 9.

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to jointures.*

*Jointure
may be sub-
jected to
condition;*

the statute, which were as beneficial to the wife as the estates before mentioned, or more so.

It has been shown ^b, that an assignment of dower against common right is not binding, if a condition be annexed thereto; but the same principle does not hold good in reference to jointures under the statute, for these may be made subject to conditions.

Thus in *Vernon's case*^c, to a writ of dower the tenant pleaded, that defendant's husband enfeoffed certain persons of land to the use of himself for life, remainder to the use of defendant, then his wife, for life, remainder to the use of the right heirs of the husband; and averred, that the life estate so limited to the defendant was for her jointure, and in satisfaction of her dower; and that on her husband's death she entered on the land so limited for her jointure, and agreed to it: the defendant in her replication confessed the feoffment and limitations, but further said, that the limitation to her was upon condition that she should perform the last will of her husband, and demanded judgment if the tenant should be admitted to aver that the estate limited to her upon condition was for her jointure, and in satisfaction of dower: to this the tenant demurred, and judgment was given against the defendant; and amongst other things it was resolved, that if the estate limited to the defendant was not within the statute of jointures, then by the common law it was no bar of her dower, but she should have both: that although the estate was upon condition, and dower, (in lieu of which the jointure came,) at the common law was an absolute estate for life; yet forasmuch as an estate for life upon condition was an estate for life, it was within the words and intent of the statute, if the defendant after the death of her husband accepted it; for that it was agreed that a jointure was a competent livelihood of freehold for the wife, to take effect immediately after the death of the husband for the life of the wife, if she herself was not the cause of the deter-

^b Supra, p. 151.

^c 4 Co. Rep. 1. Dy. 317. pl. 7.

mition, or forfeiture of it; and that if the condition bound the defendant to any unreasonable thing, she might have waived it; but that when after the death of her husband she entered and accepted the conditional estate for her jointure, she was barred of her dower: and that although the estate of the defendant was upon express condition to perform her husband's will, which imported a consideration of making the estate, yet it might be averred^a to be for the jointure of the defendant, for that one consideration stood well with the other.

A provision made for a wife intended to be for her jointure may be prevented taking effect as such by the operation of the doctrine of remitter.

As where a husband was tenant in tail, with remainder to his wife for life; and the husband made a feoffment to the use of himself and his wife for their lives for a jointure to the wife, and then died without issue: on this jointure being pleaded in bar of dower, it was adjudged to be no bar, because the wife was remitted and in of her first estate, and the jointure thereby avoided.^b

Thirdly, the jointure must be made to the same, and not to others in trust for her.^c

Thus it was said by Lord Hardwicke^d, that a conveyance to trustees was in point of law no jointure, for that to make it so the conveyance ought to be to the wife herself.

Fourthly, it must be made in satisfaction of her whole dower, and not of any particular part of it.^e

If therefore lands are conveyed to a woman before marriage for part of her jointure, and after marriage more land is conveyed to her for her full jointure, and in satisfaction of her whole dower, and afterwards the husband dies; in this case if the wife waive the land conveyed to,

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to jointures.

may be pre-
vented
taking ef-
fect by
remitter;

must be
made to
wife, and
not in trust
for her;

and in satis-
faction of
her whole
dower.

^a As to averment, see infra, p. 160. ^b See infra, p. 164.

^c Me. 872.

^d Co. Lit. 56 b.

^e 1 Atk. 563. in Hervey v. Her-

^b Co. Lit. 56 b.

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Averment
of provision
being in re-
compence
of dower
not admiss-
ible.

From *Vernon's case*, the law with respect to *deeds* appears formerly to have been, that an averment of the provision for the wife being intended as a recompence for her dower was admissible, though such provision was not expressly said to be so. And by another authority^k it is said, that where an assurance was made to a woman, to the intent it should be for her jointure, but it was not so expressed in the deed, the opinion of the Court was that it might be so averred. This point however it seems underwent an alteration in consequence of the statute of frauds^j, and that no such averment can now be made.

Therefore where upon a bill brought for dower, the defendant, the heir, insisted that the husband in his life-time had given a bond to secure to the plaintiff 500*l.* in case she survived, and that such provision was intended at the time to be in lieu of dower, and that she acknowledged it to be so, and he offered to read evidence of such acknowledgment; Lord Hardwicke was of opinion that this parol evidence could not be allowed, being within the statute of frauds and perjuries: and he observed, that a general provision for the wife was not a bar of dower, unless expressed to be so.^m

It was at one time considered, that no estate devised by will could be a jointure within the statute of 27. H. 8.; and for this proposition two reasons were assigned, the one, because by that statute the whole estate of the feoffees was transferred to the cestui-que-use, and no land after the

ⁱ 4 Co. Rep. 3 a.

^j Supra, p. 159.

^k Ow. 33. And see Tracy v. Iye, 1 Leon. 311.

^l 29. C. 2. c. 3.

^m Tinney v. Tinney, 3 Atk. 8.

making thereof was devisable till the statute of 32. H. 8., CHAP. IV.
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to jointures.* and therefore a devise of the land, which then by the law could not be made, could not be within the statute of jointures; the other reason was, because every jointure intended within the act was made and assured either before or during the coverture, as appeared by the statute itself, but a devise took its effect after the husband's death. But both these reasons have been long held untenable.

If then a husband devise land to his wife for life or in tail for her jointure, and in satisfaction of her dower, this is a jointure within the statute; for since an estate for life made to her for her jointure before marriage, when she is not his wife, is within the equity of the statute, so an estate devised to her for life, which takes effect after the dissolution of the marriage by his death, is also within the equity of it.ⁿ

And it is said by Lord Coke^o, that although land was not devisable until the statute of 32. H. 8., yet it was frequent in the books that a statute made of late time should be taken within the equity of one made long before; and of this he gives several instances.

But unless the devise to the wife be expressed in the will to be in satisfaction of dower, it cannot be averred to be so.^p

For where a husband devised land to his wife for the term of her life generally, it was resolved that such devise could not be averred to be for the jointure of the wife, and in satisfaction of her dower; and this for two reasons; first, because a devise implied a consideration in itself, and as it could not be averred to be to the use of any other than the devisee, unless so expressed in the will, so neither could it be averred to be for a jointure, unless so therein expressed, but it should be taken as a benevolence; secondly, because the whole will concerning lands by the statutes of 32. and 34. H. 8. ought to be in writing, and

ⁿ 4 Co. Rep. 4 a.
• Ibid.

^p 4 Co. Rep. 4 a.

CHAP. IV. no averment taken out of the will which could not be collected from the words contained in it.⁴

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Again, where defendant's husband devised to her several parts of his estate, all together of better value than her dower, and directed that the profits of the rest of his estate for years should be applied for payment of debts and legacies, but did not mention that he intended the provision for his wife to be in satisfaction of her dower: upon the defendant's suing at law, she recovered, though the will was pleaded, and averred to be in satisfaction of dower; but the Court was of opinion that no such averment could be admitted unless it had been so declared in the will.⁵

These observations will tend to explain a passage contained in Brooke⁶, where he says, that a devise of land by the husband to the wife by will is no bar of her dower, for that it is a benevolence, if we are to understand him thereby to mean that the devise was not expressly stated to be in satisfaction of dower.

And the principle of law which prevailed before the statute of frauds⁷, that where a will did not express a provision made for a wife to be in lieu of her dower, the omission could not be supplied by averment, acquired additional strength in consequence of that statute, which declares, that all devises of lands, &c. shall be in writing, and signed by the party, &c. in the manner and attested with the solemnities therein mentioned.

Dower recoverable on eviction of jointure. If an estate for life, in tail, or in fee simple, is conveyed to a feme for her jointure, and after the death of her husband she is evicted, she shall recover dower to the value in the residue by the express provision of the statute, and shall have but an estate for life, of what estate soever her jointure was; so that upon eviction, no greater prejudice

⁴ 4 Co. Rep. 4 a.

⁵ Lawrence v. Lawrence, 2 Freem. 254. See further as to this case infra, p. 256.; and see further as to no averment being admitted to supply any construction dehors the will, *infra*, p. 224.

⁶ Bro. Ab. tit. Dower, pl. 69. 4 Co. Rep. 4 a. Dy. 248. in pl. 78.

⁷ 29 C. 2. c. 5.

shall accrue to the terre-tenant, if the jointure was of any estate of inheritance, than if it was but for term of her life."

The important question, whether a jointure settled upon an infant feme before marriage in lieu of dower might be waved, appears to have hung in doubt previous to the decision which the case of *Drury v. Drury*¹ ultimately received in the House of Lords, determining the point in the negative. Before that case, the judicial opinions upon the subject were conflicting, that of Sir Joseph Jekyll in *Cray v. Willis*² being against such a jointure barring, and that of Lord Hardwicke in *Harvey v. Ashley*³ to the contrary.

Thus have we shortly considered the several requisites to the validity of a jointure at law. But the construction which a court of equity puts upon a provision made for a wife by way of jointure, and not according with the statute, differs materially from that which a court of law puts upon a provision similarly circumstanced. For first it may be observed, that if a jointure be not sustainable as such under the statute, a court of law will not prevent a widow from taking advantage of that circumstance, and enjoying both the provision so made for her, and also her dower.⁴ But since equity follows the law in the substance, though not in the mode and circumstances of the case, if that has been done which is equivalent to what the law would call a jointure, it will bind in equity.⁵ Therefore, though Sir Joseph Jekyll M. R. held a bond entered into before marriage to secure a sum of money for the wife's livelihood and maintenance to be no bar of dower, yet Lord King C. reversed that decree, being of opinion that such provision was a bar of dower, and within the equity of the statute of jointures.⁶ Hence it appears, that it is not absolutely re-

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to jointures.*

Infant bar-
able of
dower by
jointure
before mar-
riage.

Jointure
will bind in
equity
though not
pursuant to
the statute.

¹ 4 Co. Rep. 5 b.
² Earl of Buckinghamshire v. Drury, 3 Bro. P. C. 570. [ed. Toml.]; and see supra, p. 49. et seq.

³ 2 Eq. Ca. Ab. 389. See statement of the case, as it appears by the Register's book, in opinions and judgments of Ld. C. J. Wilmot, 223. n. (a).

⁴ 3 Atk. 607.

⁵ See supra, p. 154.

⁶ See 2 Eden's Rep. 65.

⁷ Vizard v. Longdale, cited in Tinney v. Tinney, 3 Atk. 8. And see 2 Eden's Rep. 66. 3 Bac. Ab. 717. Charles v. Andrews, 9 Mod. 152.

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to jointures.*

Feme adult
may pre-
clude her-
self of
dower by
any provi-
sion, though
precarious.
Where she
may elect
between
equitable
jointure
and dower.
Infant may
bar herself
of dower
by a certain
provision,
though not
constituting
a strict
legal join-
ture;

and though
neither her-
self nor her
parents or
guardians
be parties
to the set-
tlement,
ut simile.

Where in-
fant may

quisite for the wife to be made a party to the instrument conferring the jointure.^b And a court of equity will permit a feme sole adult to preclude herself of dower, by agreeing to accept any provision in lieu thereof, whether legal or equitable, and though resting merely in covenant, and proceeding either out of the real or personal estate of the husband; and even though of a doubtful and contingent nature.^c And if such provision be made after marriage, the wife will be enabled, upon her husband's death, to exercise the same election between that provision and her dower, as she may exercise at law between her dower and a strict legal jointure made after marriage by virtue of the statute of jointures. An infant feme may also by settlement made with the concurrence of her parents or guardians agree to accept a provision in lieu of dower, though the same possess not the several properties of a strict legal jointure, as if, for instance, it be not expressly charged on any particular lands, nor secured out of lands generally^d: but then the provision must be as certain as her dower, and not precarious and such as she may never enjoy; in which latter respect her situation differs from that of a feme adult.^e

It seems however that in order to sustain such a settlement, it is not absolutely necessary that the infant or her parents or guardians be made parties to it.^f But whether they be made parties to the settlement or not, it would probably be deemed requisite that a representation should in either case be made to the parents or guardians of the jointure intended to be settled upon the infant, in order that they may judge of its adequacy with reference to her fortune and rank in life.^g And if the jointure provision

^b See 1 Cru. Dig. 228.

^c See Jordan v. Savage, cited 3 Bac. Ab. 717. 4 Bro. C. C. 515. in Caruthers v. Caruthers.

^d Earl of Buckingham v. Drury, 3 Bro. P. C. 570. [ed. Toml.] 2 Eden's Rep. 60. Drury v. Drury, ibid. 39. And see Williams v. Chitty, 3 Ves. 545.

^e Caruthers v. Caruthers, 4 Bro.

C. C. 499. Smith v. Smith, 5 Ves. 189. Corbet v. Corbet, 1 Sim. & Stu. 612. And see supra, p. 49. et seq.

^f See Jordan v. Savage, supra. Williams v. Chitty, supra.

^g See Estcourt v. Estcourt, 1 Cox's C. C. 20.

be not equally certain with her dower, or be made after marriage, equity will permit her to elect between the two interests.

In the Treatise on the Law of Husband and Wife^h, after noticing that copyhold estates were not within the statute of jointures, it is observed, that if a settlement thereof, or of property less than freehold, was not a good legal jointure within the statute, except the widow could in the latter case, as against the heir, be entitled to the privilege of having the provision secured out of the husband's real estates, beyond which the case of *Earl of Buckingham v. Drury*¹ was no authority, it was to have been inferred that when jointures upon infants before marriage were of copyhold or leasehold estates, they would not have been barred by them in equity, unless they had confirmed them by acceptance after the death of their husbands, when sui juris and under no disability. And with these observations the cases of *Jordan and Savage*^j and *Williams v. Chitty*^k are considered to be irreconcileable, the subject of jointure consisting in the former case of copyhold property, and in the latter of leasehold property. In answer to which it may be remarked, that it seems by no means clear that a jointure settled upon an infant feme previous to marriage must, in order to be conclusive upon her in equity, proceed either directly or indirectly out of freehold property, or even out of lands of whatsoever tenure. All that appears requisite is, that the subject matter of it be competent and certain; and in *Earl of Buckingham v. Drury*¹ Lord Hardwicke said, that every certain provision, with consent of the wife, parents, or guardian, though not a jointure within the statute, was good in equity, which observation must have been meant to apply to the case of an infant feme equally with that of an adult feme. And amongst other cases, his Lordship had direct recourse to the case

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elect be-
tween
dower and
jointure.

^h Vol. i. 482, 485. And see n. (a), 486. ibid. [2d ed.]

ⁱ Supra.

^j 5 Bac. Ab. 717.

^k Supra.

¹ See 2 Eden's Rep. 65. And see 3 Atk 612. Smith v. Smith, 5 Ves. 189.

CHAP. IV. of *Jordan v. Savage*¹ for the purpose of illustrating the doctrine he was contending for.
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Lord Thurlow's observation in *Durnford v. Lane*²; that he thought the Court should not go into the competency of the settlement, seems not to have had application to its competency in reference to the subject matter of jointure, but to its competency in reference to the infant's covenant as to her real estate being binding upon her. And in *Milner v. Lord Harewood*³, Lord Eldon merely expresses himself to concur in the opinion of Lord Thurlow, that a female infant would not be bound by a covenant upon marriage as to her landed property, without allusion to the competency of a jointure to bar her of dower. So that nothing very material can be drawn from those dicta, oppugning the proposition that an infant feine may be barred of dower by any provision if competent and certain.

What election court of law can compel between dower and jointure.

Further, where a husband makes a provision for his wife by will, and the same does not possess the several requisites of a legal jointure, and though possessing those requisites, yet is not expressed to be by way of jointure and in bar of dower, a court of law will not interpose its authority to prevent a widow from recovering her dower, and also enjoying the provision. All it can do is in the case of a strict legal jointure made after marriage, and either by deed or will, where it may compel the wife to elect between such jointure and her dower; and this power it seems to derive wholly from the statute. But there are many cases which we shall presently have occasion to consider⁴, wherein a court of equity will oblige a widow to elect between a provision made for her by will and her dower, though such provision is neither warranted by the statute, nor in express terms mentioned to be in bar of dower, but a strong and manifest inference arises upon the whole of the will, that it was the intention of the testator so to consider it. Where the provision is expressly stated to be intended as a bar of dower, the testator himself proposes a case of election, and

What election court of equity can compel.

¹ Supra.
² 1 Bro. C. C. 115.

³ 18 Ves. 275.
⁴ See infra, Part II. Ch. III.

renders it unnecessary for the Court to do so, be the nature of the provision what it may.

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*Election of
to jointure.*

By the ninth section of the statute of jointures it was enacted, that if any wife should have any manors lands tenements or hereditaments unto her given and assured after marriage for term of her life or otherwise in jointure, except by act of parliament, she should be at liberty, after her husband's death, to refuse such jointure, and resort to her dower at common law.

*Election
between
jointure
after mar-
riage and
dower.*

Seeing then that this section of the statute gives the wife, in case the jointure be made after marriage, a right of election between such jointure and the provision the common law has made for her; the next inquiry proposed to be made is,

II. The commission of what acts by the wife after her husband's death will be deemed an acceptance of a jointure made after marriage, so as to preclude her election to waive the same and resort to her dower.

It has been resolved, that a widow may waive a jointure made after marriage by indicating her disagreement thereto by mere act in *pais*, without the necessity of alleging the same by deed, or in a court of record: and her ability so to waive such jointure was said to result from the above mentioned section of the statute.⁴

*When elec-
tion be-
tween dow-
er and join-
ture after
marriage
will be de-
termined.*

*Widow
may wave
jointure
after mar-
riage by
disagree-
ment in
pais.*

In the case indeed in which this point was so agreed it is laid down⁵, that if at the common law lands are given to husband and wife in tail or in fee, the wife cannot upon the husband's death devest the freehold out of her by any verbal waver or disagreement in *pais*; as if before any entry made by her she saith, that she utterly waves and disagrees to the estate, and will not accept thereof; yet that the freehold remains in her, and she may enter when she pleases: so if before entry she saith, that she agrees to

⁴ Butler and Baker's ca., 3 Co. Rep. 27 a. ⁵ See 3 Co. Rep. 26 a., first re-
solution in Butler and Baker's ca.

CHAP. IV. the said estate, or uses words tantamount, yet that she may afterwards wave it in a court of record; for that a verbal assent and agreement in *pais* is not of any effect in law.

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to jointures.**

But this exposition of the law must now be read with suspicion, in consequence of what fell from the Court of King's Bench in the case of *Townson v. Tickell*.^{*}

**Entry upon
jointure
property
will con-
clude
widow.**

An entry by a widow upon the jointure property after her right of election has accrued will of course bind her.

Thus where a husband was solely seised in fee of the manor of A., and was seised jointly with his wife of the manor of B. for an estate in special tail made to them during the coverture for the jointure of the wife, with reversion to the husband in fee; and he devised the manor of A. to his wife for life, on condition that she should not take her former jointure, with remainders over, and died; and the wife refused her former jointure, and entered upon the manor of A.; — on the question whether the refusal in *pais* should devest the estate tail which was vested in the wife, it was resolved, that the refusal in *pais* to have the manor of B., and the entry upon and agreement to the manor of A., was a good agreement to one and a refusal of the other, and that thereby the inheritance was devested.^t

And it was argued by Egerton solicitor general in the last case^u, that the disagreement by the wife in *pais* was good by common law; and that such disagreement might be in *pais* and by word seemed by the above section of the statute of uses under the words, "or otherwise," namely, by word and acceptance in *pais*: and that if in a writ of dower the tenant would bar the demandant by jointure made during the coverture, he ought to say, that by entering she agreed, &c.

But though the wife should secretly enter upon land limited during the coverture for her jointure, thereby acquiring the actual seisin thereof; yet if she afterwards recover dower out of the whole land whereof her husband

* 3 Barn. & Ald. 31.

^t Butler and Baker's ca., 5 Co. Rep. 25 a.

^u See 3 Leon. 271.

died seised, including therein the jointure land, she will be estopped to claim any part of it as a jointure.^v

And an entry by the wife upon part of property settled upon her during the coverture in lieu of her jointure will preclude her from waving that provision, and resorting to her dower. As where a husband, by articles during the marriage, made a provision for his wife, who was an infant, and after his death she entered upon 46*l.* per annum, part thereof only; — she was held bound to perform the whole articles.^w

But if the wife have a title to the provision made for her by way of jointure independently of the agreement, then her entry thereupon will not, it seems, be conclusive upon her so as to bar her of dower.^x

If a feme infant marry, and a jointure is made after marriage, and the husband die, leaving her an infant; — if she, without doing any act to determine her election during her infancy, marry a second husband, and he enter upon the jointure, that entry will bind the husband and wife during the coverture.^y

Brograve, in his reading on jointures^z, enumerates several instances of what acts by a feme amount to an agreement to her jointure, and what to a refusal of it: amongst the former he puts these cases: — If land be given to husband and wife, being infants, for a jointure, and the husband dies, and the wife being within age takes another husband, or takes the profits, or makes a lease before entry, or grants a rent out of it, this is an agreement. So if the feme before entry grants a rent out of her jointure specially, or surrenders to the heir of the husband, these several acts constitute an agreement.^a

III. The commission of what acts by the wife after husband's death will not be deemed an acceptance of a jointure.

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to jointure.

So entry
upon part
of jointure
property.

Where such
entry will
not con-
clude.

Where act
of husband
will bind
wife.

What acts
constitute
an agree-
ment to a
jointure
after mar-
riage.

When elec-
tion be-
tween dow-

^v See 4 Co. Rep. 4 b. 5 a. b.

^v See 3 Atk. 617. in Harvey v.

^w 2 Vern. 225., cited as Sir E.

Ashley.

Moseley's ca. And see Maynard v. Moseley, 1 Ch. Ca. 255.

^w This reading was delivered at Gray's Inn in the summer of 1576.

^x Thomas v. Lane, 2 Ch. Ca. 27.

^x Brog. Read. 97. lect. 10. pl. 2,

3, 4.

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to jointure.*

er and jointure after marriage will not be determined. What acts constitute a disagreement, or no agreement, to a jointure after marriage.

ture made after marriage, so as to preclude her election to wave the same and resort to her dower.

It was said in the case of *Colthirst v. Delves*^b, that a widow by refusal *en paix* might wave her jointure and hold her to her dower, and that this was a sufficient election; and that if she once refused her jointure in her own house amongst her servants, and not to the heir, yet this was a good refusal. And Periam J. said, that where a jointure was conveyed to the wife during coverture, and after the death of the husband she said nothing, but brought a writ of dower; this was a good refusal. And it was further said in the same case, that if a baron made a jointure to his wife during coverture, and after devised other lands to her instead of her jointure; she might refuse the jointure and hold her to the devise; and that this should be good by the statute; (though Gawdy J. moved to the contrary, because the statute was, that she might refuse the jointure and hold to her dower;) but it was agreed, that if she once assented to the jointure, she could not waive it afterwards.

Brograve, in his reading before referred to, has the following instances of what acts do not constitute an agreement to a jointure.^c If a jointure be made after marriage, and the baron dies, and the wife does not enter, and praescribe is brought against her, and she disclaims or pleads non-tenure; this is a refusal of the jointure. So if land be given to baron and feme for their lives for a jointure, and the baron dies, and the feme brings a writ of dower, and appears in person or by attorney authorized; this is a refusal. And so it is, though she brings dower only for a third part of the residue, and not of all the lands of the husband.^d So if the heir demands of the wife if she will have her jointure, and she says that she will not have it, or if she say so to a stranger, this is not a peremptory refusal: but if she say so to the heir upon the land whereof she is dowable, and pray him to assign her dower, this is a refusal peremptory to the jointure.^e So again, if a house

^b Goulds. 84. pl. 6.

^c Brog. Read. 96. lect. 9. pl. 1, 2.

^d 4 Co. Rep. 5 b.

^e Brog. Read. supra, pl. 3.

be assured to husband and wife for a jointure, and the wife immediately on the husband's death departs from that house to another; or if land be given to husband and wife for a jointure, rendering rent, and the husband dies, and the wife refuses on demand to pay the rent in arrear; in neither of these cases do the acts of the wife amount to a refusal of the jointure.^a

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to jointures*

And if land be given to husband and wife for a jointure, and the husband dies; and the wife before entry grants a rent out of all her land in D.; though she hath no other land there but her jointure, yet this is no agreement.^b

And in the case of *Sherley v. Wood* it was said, that the entry of the wife, and her renititer to claim by force thereof, amounted to a refusal of her jointure.^b

It seems that when the interest of creditors is concerned, the legal right of a widow to elect between her dower and a jointure made after marriage will in some cases be controlled so as best to consult that interest, but without prejudicing her estate.

When
widow's
election be-
tween dow-
er and jointure
after
marriage
will be
controlled:

Therefore where, by a settlement made after marriage, lands were limited to the husband's father for life, remainder to his mother for life, remainder to the husband for life, remainder to the wife for life for her jointure and in bar of dower; and the husband being indebted in 500*l.* on a judgment, devised his lands to trustees for payment of debts, and died leaving his father surviving, on whose death and that of the mother the wife insisted upon waving the jointure and having her dower, the consequence of which would have been to render the lands not subject to the payment of the testator's debts, since they were never part of his property, he not having survived his father: she was decreed to take the estate for life under the settlement, and assign it over in trust for the creditors, who should convey to her a third of the lands of her husband for her dower, free from incumbrances.^c

^a Ibid. pl. 4 & 5.

^b Ibid. pl. 3.

^c Hob. 72.

^c Mills v. Eden, 10 Mod. 487. \

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*Election as
to jointures.*

Widow
may claim
dower
where join-
ture after
marriage
has been
alienated
by fine.

Lastly we may add, that if a jointure be made during the coverture, and the husband and wife alien it by fine ; there, notwithstanding such alienation, yet seeing that the wife's estate was originally wavable, and her time of election was not come till after the death of her husband, she may claim her dower in the residue of her husband's land ; but it would have been otherwise had the jointure been made before coverture.¹

The foregoing consideration of the law of election in application to dower and jointure has in a great measure prepared the way for the discussion of the doctrine of election forming the subject of the second part of the present treatise, and upon which it is now proposed to enter.

¹ Dy. 358. pl. 49. 1 Bulst. 173. 3 Leon. 272. Co. Lit. 36 b.

PART II.

ON THE DOCTRINE OF ELECTION AND SATISFACTION IN COURTS OF EQUITY.

IN this second part of the present treatise the doctrine of election and satisfaction as administered by Courts of Equity is attempted to be discussed. The subject is comprised in seven chapters, in the first of which are considered the source and definitions of the doctrine, and its application as well to persons as things; in the second, the doctrine is considered in detail with reference to cases arising under deeds and wills; in the third, it is considered in application to dower; in the fourth, in application to copyhold property; and in the fifth chapter the consequences of an election are considered, involving an inquiry into the principles of compensation and forfeiture: the sixth chapter consists of an inquiry into the doctrine of satisfaction, so far as the same bears an analogy to that of election: and the seventh and last chapter is composed of an inquiry into the ability of persons to elect between money and land. In the appendix an attempt is made to elucidate the nature of the doctrine of probate and reprobate in the Scotch law, since it bears a direct analogy to that doctrine of election in our law which will first present itself for discussion: and herewith the treatise terminates.

Introductory remarks.

CHAP. I.

AS TO THE EQUITABLE DOCTRINE OF ELECTION IN
GENERAL.

PREVIOUSLY to considering at large the several cases connected with this doctrine, it may be proper to devote the present chapter to making some preliminary observations under the following arrangement:—

I. As to the doctrine of election in general, its several definitions and characteristic qualities.

II. As to what interests the doctrine is applicable; and as to the persons on whom it is not incumbent to elect.

III. As to the persons by whom an election may be compelled.

IV. As to the persons by whom an election may be made.

I. As to the doctrine of election in general, its several definitions and characteristic qualities.

The doctrine of election has been said to be founded upon principles of universal equity, which prevail in the laws of all countries^a; and the principle of it is clear, not merely as an abstract theory, but pursued to practical consequences.^b But it appears to have been originally derived by us from the civil law.^c

In that law we meet with the following passages, wherein may probably be discovered the source whence our doctrine was in the first instance deduced^d: “Quando cessen hæc bonorum possessio. § 1. Prima causa: Si patronus cui contra tabulas possessio competebat, judicium defuncti agnoverit. XLII. Patronus patronique liberi, si secundum

^a See 1 Eden's Rep. 535. in Foster v. Cotton.

^c See accord. 1 Swanst. 396. in notis; and 19 Ves. 663. in Tibbits v. Tibbits.

^b See 1 Swanst. 420. in Dillon v. Parker.

^d See l. 7. ff. de bonis libertorum.

Origin of
the doc-
trine.

voluntatem mortui liberti hereditatem adierint, legatumve aut fidei commissum petere maluerint; ad contra tabulas bonorum possessionem non admittuntur. l. 6. § fin. Ulp. lib. 43. ad Sabin. *Nam absurdum videtur licere eidem, partim comprobare judicium defuncti, partim everttere.* l. 7. Gaius lib. 15. ad Ed. Provinc." Then follow several cases in which the patron might and might not take possession of the goods against the will.

CHAR. I.
*As to the
equitable
doctrine of
election in
general.*

The foregoing rule or maxim, though in the particular passage applicable to wills only, yet furnishes the principle of the doctrine in its full extent against whatever instruments it may be brought to bear; and it is observable, that nearly all the cases of election which have been discussed in our courts have arisen upon wills; and therefore the doctrine, when spoken of, has generally been so with reference to those instruments.

The state however in which the doctrine existed at the civil law seems to have been considerably modified and enlarged upon by our courts of equity, and has been at length reduced to a well established system, and one of no unfrequent recurrence.

Various are the definitions that have been given of the doctrine by great and eminent Judges, many of which in the main agree, though expressed in different terms of language. Some indeed are much more comprehensive and explanatory than others, but those which point at the principle of compensation, as necessarily attendant upon an election being made to take in one particular way, seem to convey the clearest idea of the doctrine, and deserve the more particular notice: and we shall find, that in consequence of most of the cases wherein the subject has been discussed having arisen upon wills, the definitions have been usually given with more immediate reference to those instruments. In the first place then the following definition may be adduced. The principle of election "is not a case of express condition, being no forfeiture of in-

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trine.

* See Pothier Pandectæ Justinianæ, tom. iii. Paris ed. 1818.

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terest, but the Court lays hold on what is devised, and makes compensation out of that to the disappointed party.”— “An express condition must be performed as framed, and if it be not, that will induce a forfeiture; but the equity of the Court is, to sequester the devised interest *quousque*, until satisfaction be made to the disappointed devisee.”^f So, “all election goes upon compensation: if by a will which gives A.’s estate to B., an estate is given to A., he may say he will keep his own estate: the compensation upon which the Court goes is the implied condition, of which the other is to have the benefit, that whoever takes that estate in consequence of the election, shall take *cum onere*.”^g And “where a case of election is raised, it does not give a right to retain the thing itself, though it may give a right to compensation out of the thing itself.”^h Again, election has been defined to be, “where a testator gives what does not belong to him, but belongs to some other person, and gives that person some estate of his own; by virtue of which gift a condition is implied, either that he shall part with his own estate, or shall not take the bounty:” or, to reduce the definition to still more familiar language, “If I give an estate belonging to A., which I have no power to give without his concurrence, and give any estate to A., it shall be understood to be given upon condition that he shall permit my will to take effect as to the other.”ⁱ And the jurisdiction exercised by a court of equity compelling election has been thus described: “A person shall not claim an interest under an instrument, without giving full effect to that instrument as far as he can. If therefore a testator intending to dispose of his property, and making all his arrangements under the impression that he has power to dispose of all that is the subject of his will, mixes in his disposition property that belongs to another person, or property as to which another person has a right to de-

^f See 2 Ves. jun. 560. in Lady Cavan v. Pulteney, per De Grey C.J.

^g See 18 Ves. 49. in Dashwood v. Peyton, per Lord Eldon C.

^h See 10 Ves. 609. 616. in Broome Cockell, per Lord Eldon C.

ⁱ See 9 Ves. 379. in Rich v. v. Monck, per Lord Eldon C.

feat his disposition, giving to that person an interest by his will; that person shall not be permitted to defeat the disposition where it is in his power, and yet take under the will; the reason is the implied condition that he shall not take both; and the consequence follows, that there must be an election; for though the mistake of the testator cannot affect the property of another person, yet that person shall not take the testator's property, unless in the manner intended by the testator.”

The doctrine of election, of which we are now speaking, has been considered by some eminent Judges to be as well a principle of law as of equity. “The application of the doctrine,” said Lord C. Rosslyn^k, “is more frequent in courts of equity than of law, but often recognized by the latter. You cannot act, you cannot come forth to a court of justice claiming in repugnant rights. Upon this principle it is, that a court will not allow a tenant to set up a title against his landlord.” And Lord Mansfield C. J. clearly seems to have considered the doctrine of election to be a proper subject for discussion in a court of law. In *Doe v. Cavendish*^l his Lordship, in delivering the opinion of the Court, had direct recourse to the doctrine, though the application of it was not necessary to the decision of the point upon which the Court had to pronounce.

There A., having power to limit estates to the use of such of his children as he by deed or will should appoint, by his will limited the same to his two younger sons in strict settlement, with remainder to his eldest son in fee; and on the question whether the power was well executed, the same was held to be so. But Lord Mansfield took up as the first ground of decision and applied to the case the doctrine of election, which it seems did not constitute a subject of discussion upon the argument. His Lordship, after observing that A. had by his will left great bequests

^j See 13 Ves. 220, 221. in *Thel-*
lusson v. Woodford, per Lord
Erskine C.

^k See 2 Ves. jun. 696, 697. in
Wilson v. Lord John Townshend.
^l 4 T. R. 741. in n.; and see
Goodtitle v. Bailey, Cowp. 597.

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to all his children, who since his death had attained twenty-one, and had taken the bequests under the will, and enjoyed them ever since, proceeded to state, that it was not permitted to any of the parties to the cause to dispute A.'s will, or whether he had made the appointment legally or illegally: — that their mouths were shut: — that it was a tacit condition that every man who took under a will was bound, not only not to dispute the will, but to maintain the title of all the rest, unless he gave up every thing under it: — that no rule could be better established, than that whoever took under a will, unless he gave up the right which he derived from it, could not dispute other provisions of it; a most reasonable rule, because a man made his will, supposing the whole to stand: — that the plaintiffs, (two of A.'s children,) claimed great property under A.'s will, and had taken it: — that if they rejected his will, they must renounce all benefit under it.

And we may proceed to state, that Lord Redesdale, the late learned Chancellor of Ireland, has thus expressed himself upon the doctrine of election: —

“The general rule is, that a person cannot accept and reject the same instrument: and this is the foundation of the law of election, on which courts of equity, particularly, have grounded a variety of decisions, in cases both of deeds and of wills, though principally in cases of wills; because deeds, being generally matter of contract, the contract is not to be interpreted otherwise than as the consideration which is expressed requires; and voluntary deeds are generally prepared with greater deliberation, and more knowledge of pre-existing circumstances than wills, which are often prepared with less care, and by persons uninformed of circumstances, and sometimes ignorant of the effect even of the language which they use. In wills therefore it is frequently necessary to consider the general purport of the disposition, in order to extract from it what is the intention of the testator. The rule of election however I take to be applicable to every species of instrument, whether deed or will, and to be a

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rule of law as well as of equity; and the principal reason why courts of equity are more frequently called upon to consider the subject, (particularly as to wills,) than courts of law, I apprehend, is, that at law, in consequence of the forms of proceeding, the party cannot be put to elect; for in order to enable a court of law to apply the principle, the party must either be deemed concluded, being bound by the nature of the instrument, or must have acted upon it in such a manner as to be deemed concluded by what he has done, that is, to have elected. This frequently throws the jurisdiction into equity, which can compel the party to make an election, and not leave it uncertain under what title he may take. Courts of equity also act with respect to infants in a manner in which courts of law cannot act. The modes of proceeding also in courts of law frequently throw these questions into courts of equity, especially where there may be a legal right to sue at law under one title, wholly independent of the other, which may be a title merely equitable."^m

And his Lordship proceeded to observe, that he apprehended there was no difference in principle in the decisions of the Courts: — that the question had been decided in courts of law with respect to dower, wherever the form of the proceeding admitted of such decision: — that in 3. Leon. 273.ⁿ, where a provision in bar of dower was made for the wife after marriage, and consequently she was not bound to accept it, it was held, that if the wife agreed to such a provision by entry after the death of the husband, she might be barred in a writ of dower by plea "*quod intrando agreeavit*," that is, her election bound her, though the agreement did not: — that on the other hand it had also been determined in a court of law^o, that if the wife brought a writ of dower, and recovered, she should be barred of her right of entry for a rent-charge devised in lieu of dower, because it was against the intention of the will she

^m See 2 Scho. & Lef. 448, 449. ⁿ Gosling v. Warburton, Cro. in Birmingham v. Kirwan. El. 128.

^o Butler & Baker's ca.

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should have both, and the acceptance of one was a waiver of the other: — that a court of law therefore would take notice of a provision made for a wife; and if made in bar of dower, and she claimed it after recovery in a writ of dower, the court of law would hold her barred by that proceeding from claiming the provision made in bar of the dower so recovered: — that in those cases the acts of the wife had declared her election; and having declared her election, and proceeded upon it in the one case by entry, and in the other by act on record, she was deemed by her own act to have put an end in the first case to her claim of dower, in the other to her claim of the rent-charge given in bar of dower: — that however it was obvious, that in a variety of instances the justice of such a case could not be reached in a court of law, and the interference of a court of equity became therefore necessary.^p

Notwithstanding the authority of the foregoing dicta, it will be probably considered very questionable how far a court of law is a proper tribunal for entertaining discussions upon the doctrine of election. Leonard's report of *Butler & Baker's case*^q, one of the authorities adduced by Lord Redesdale in support of the proposition that election is a principle of law as well as of equity, purports only to be the argument of Egerton, Solicitor General; and it is observable, that he seems to consider the power which a wife has of waving a jointure made after marriage to be wholly derivable from the ninth section of the statute^r, and does not contend for the existence of any power originally inherent in a court of law of sufficient force in itself to compel an election under such circumstances. The case of *Gosling v. Warburton*^s, another of the authorities cited by Lord Redesdale, goes only to prove, that where by virtue of the statute it is incumbent on a wife to elect between a wavable jointure and her dower, her recovery of the latter will be a bar to her former substitutionary provision.

^p See 2 Scho. & Lef. 450, 451.

^q 3 Leon. 271.

^r 27 H. 8. c. 10.

^s Cro. El. 128.

It has in effect been before stated^t, that if a jointure is not made in all respects agreeably with the intent of the statute, a court of common law will not restrain a widow from enforcing her dower, and also recovering the defective jointure: and this appears to be the case, whether the jointure was originated by deed or will. The only power a court of common law has to compel an election is in the case of a jointure made after marriage; and this power it immediately derives from the statute, and exercises only where the jointure is fully warranted thereby. Do not these circumstances then considerably strengthen the argument of those who contend that the doctrine of election is a creature of equity only, and not cognizable by a court of law?

It may moreover be observed, that it was said in argument in the case of *Robinson v. Hardcastle*^u, that in *Doe v. Cavendish*^v Lord Mansfield for the first time in a court of law took up the point of election. And Lord Hardwicke seems to have considered election as a doctrine depending on the equity of the court, which he said was, that no person should take by a will, and at the same time do any thing which should destroy the will^w: and he has elsewhere termed it a benevolent equity.^x And Lord Commissioner Eyre has expressed himself, that putting a devisee to election, however reasonable and just it might be, was certainly a strong operation of a court of equity.^y Again we find it said, that a man may give by a mean and indirectly what is not his own, either by express condition, or equity arising upon an implied condition. Where a testator has neglected, probably from ignorance, possibly from inattention to the nature of the estate, to insert such a condition, then a court of equity interposes.^z

^t See *supra*, page 154.

^u 2 Bro. C. C. 28.

^v *Supra*, page 177.

^w See 2 Atk. 629. in *Morris v. Burrows.*

^x See 3 Atk. 715. in *Hearle v. Greenbank.*

^y See 1 Ves. Jun. 523. in *Blake v. Bunbury.*

^z See 3 Ves. 530. in *Hinchcliffe v. Hinchcliffe.*

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The position that the doctrine of election is a principle of equity and not of law seems also to be partly set at rest by what fell from the Chief Justice of the Common Pleas in delivering the judgment of that Court in the recent case of *Halford v. Dillon*^a, which, so far as concerns the present purpose, may be thus stated. — On the marriage of A. with B., an estate was settled to the use of A. for life, remainder to his first and other sons in tail male, remainder to himself in fee. There was issue of the marriage one son, C., who attained twenty-one, but died without issue in his father's lifetime, whose reversionary estate consequently thereupon fell into possession; and he subsequently made a disposition of the estate by his will. On a motion for a new trial, the merits of which it is not necessary to advert to, one of the grounds insisted on was, that C. having by his will taken upon himself to devise the estate to his father for life, with remainder to his sisters of the half blood, and the father having accepted certain benefits devised to him by C.'s will, he, the father, had thereby elected to abide by and confirm the will in all its parts; and that by such acceptance and election he was either actually divested of the reversion in fee reserved to him by the settlement, or else that he and all persons claiming under him were estopped from setting up the settlement, or otherwise controverting the right of C. to dispose of the fee in the estate to his two sisters. And it was argued, that the doctrine of election was a doctrine of the common law, and borrowed from thence by courts of equity: and that although the interposition of a court of equity might in certain cases be necessary to compel a party to elect, yet that when he had made his election to take under the will, and had accepted the benefit thereby given to him, the aid of such a court was not necessary to divest him of any property which he held in repugnance to the will; but that in such case he was, *ipso facto*, divested or estopped by the operation of the

^a 2 Brod. & Bing. 12.

common law. But the Chief Justice in pronouncing the judgment of the Court said, that as to the cases in equity respecting election, it appeared to the Court that the principle of such cases was *entirely a principle of equity*, proceeding on the doctrine of an implied condition, of which a court of equity would enforce the performance, viz. by compelling the devisee, if he elected to take the benefit of the devise, to convey his original estate, so that it might pass in conformity to the will:— that those cases seemed to the Court to afford no authority showing what the effect of such election was at the common law, and without the aid of a court of equity. And the Chief Justice attributed some of the expressions which fell from Lord Mansfield in the before-mentioned case of *Doe v. Cavendish*^b to the circumstance of its having occurred at a time when it was thought that an equitable title would be sufficient to support or to defend an action of ejectment, contrary to the legal right of possession.

The only instances in which the doctrine of election has been limited are said to be, where an attempt has been made to devise an estate which is in settlement, or belongs to another person, by a will not attested by three witnesses, and an attempt to devise by an infant; the Court in each case being precluded from looking at the will; in the former, by reason of its not being executed with the solemnity required by law as to freehold estate, and in the latter, by reason of the incapacity of person.^c

It seems to be an unsettled point, how far the doctrine of election is applicable to grants of the crown. The question was partially discussed in the late case of *Cumming v. Forrester*^d, but it was unnecessary to decide upon it. The Master of the Rolls there observed, that he felt a difficulty in applying the doctrine of election to the crown, for the crown, being always in existence, might always be applied to to set right the grant; and if the party elected to

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^b *Supra*, page 177.

^d *2 Jac. & Walk.* 334. 545.

^c See 13 Ves. 223, 224. in *Thel-*
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renounce what the grant had given him, the consequence was, that as to that part the grant did not take effect; and then, did not that part revert to the crown? Could the Court take hold of it to make satisfaction to the other?^e

II. As to what interests the doctrine of election is applicable; and as to the persons on whom it is not incumbent to elect.

The doctrine of election has been said to apply to interests of married women, infants, interests immediate, remote, contingent, of value or not of value.^f And Lord Redesdale has said^g, the rule of election seemed to him to apply to every species of right. And we find that a remainder, though remote and of little value, being liable to be barred by a previous remainder-man in tail, was yet deemed sufficient to raise a case of election.

For where there was a devise of freehold and copyhold estates in strict settlement, with a remainder for life to the heir at law after an estate tail to the first and other sons of the first devisee; Lord Hardwicke held that the heir must give up the remote remainder, or surrender the copyhold estate to the use of the will.^h

And in *Highway v. Banner*ⁱ the Master of the Rolls intimated his opinion to be, that a person claiming a remainder under a will was compellable to make an election, if such claim was calculated to defeat any of the dispositions thereby made.

In a subsequent case however^j Lord Hardwicke seems to have thought, though he guarded himself against giving any opinion on the point, that the doctrine of election was not applicable to interests in remainder. And the Court of Exchequer in Ireland came to this conclusion in the

* By what is stated in a former page, it appears that a subject cannot have any election against the king. See *supra*, page 22.

^k *Boughton v. Boughton*, 2 Ves. sen. 12.; *infra*, page 210. See 2 Ves. jun. 697. in *Wilson v. Lord John Townshend*; 3 Ves. 67. in *Rumbold*

v. *Rumbold*; and *Webb v. Earl of Shaftesbury*, 7 Ves. 480.

^l See 2 Scho. & Lef. 449. in *Birmingham v. Kirwan*.

^m *Graves v. Forman*, cited 3 Ves. 67. in *Rumbold v. Rumbold*.

ⁿ 1 Bro. C. C. 587.

^o *Bor v. Bor*, 3 Bro. P. C. [ed. Toml.] 170. n.

case of *Stewart v. Henry*.^k There a testator had by his marriage settlement power to appoint certain lands, in case there should be two or more sons of the marriage living at his decease, in favour of such of them, in such shares and proportions, and for such estate therein, and with such limitations and remainders over, as he should direct; and for want thereof, the same were limited to the use of the eldest of such sons in tail male, with a like limitation in remainder to the second and other sons; and having had three sons, A. B. and C., and two daughters, he by his will appointed the lands to A. for life, remainder to his first and other sons successively in tail male, remainder, (subject to 1000*l.* for his, the testator's, daughters and issue unborn,) to his sons B. and C. for their lives as tenants in common, with remainder to their first and other sons successively. A. having enjoyed the property some few years after his father's death, died without issue, whereupon B. and C., who were also otherwise benefited under the will, came into the possession thereof: and a bill having been filed by those conceiving themselves entitled to the 1000*l.*, and the question being, whether they were entitled to have the same charged on the settled estate in the event which had happened of that estate coming to B. and C., the Court held them not to be so entitled. And Yelverton C. B. in delivering the opinion of the Court observed, that it was said, where a devisee took a gift under a will, the law annexed a condition to the gift that he should not dispute any other part of the will, even though that other part gave away from him something to which he had an undoubted right, but must make his election whether he would renounce the particular gift to him by the will, or abide by the will altogether:—that this was certainly a good rule, but had many exceptions. And after stating several exceptions to the rule he proceeded to observe, that he would take the liberty of adding another, which was, where the testator bequeathed a present gift to a remainder-man after an estate tail, and by the same will either gave the

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^k Vern. & Scriv. 49.

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lands to another, having no power to give them, or subjected the remainder to a charge to which he had no power to subject it; that in neither case was the remainder-man subject to the equity of making his election, whether he would renounce all benefit under the will, or do all in his power to make good the devise of the remainder in the one case, or confirm the charge in the other:—that though Lord Hardwicke, in the case of *Bor v. Bor*¹, avoided giving any opinion upon the point of election as not before him, yet it was plain what his opinion would have been in case such a point had come before him:—that he said expressly, in cases of wills things were to be considered as they stood at the time of the testator's death, and that it would be dangerous to consider them in any other light. Again, that those tacit conditions ought to be construed as they stood at the death of the testator; and that the implication which raised a condition must be a necessary implication, something as if *scriptum* in the will; for that otherwise an implication might be raised contrary to the intent.

And the C. Baron proceeded to state, that to apply those observations to the case before him; suppose the plaintiffs had come at the death of the testator, and in the lifetime of A., to have the 1000*l.* decreed a charge on the remainder limited to B. and C.; could the Court say, either you shall consent to take this remainder subject to this charge, or you shall take nothing at all under the will?—that even if they did consent, their consent could not bind their issue, because they were only tenants for life; and that even if it could, yet such consent and the remainder itself might be annihilated by a recovery to be suffered by the issue of A.:—that such a decree therefore would, to use Lord Hardwicke's words, give the plaintiffs only so much moonshine, and would not be a fit decree to be made; and that if not at the death of the testator, neither was it a fit decree to be made then:—that though it had so happened that A. was

¹ Supra, page 184.

dead without issue, yet such circumstance ought not to alter the case, if it were true, as Lord Hardwicke declared, that those tacit conditions ought to be considered as they stood at the time of the testator's death: — that Lord Hardwicke, to apply another of his observations, had said, the implication to raise such a condition ought to be a necessary implication, something as strong as if written in the will: — that in the case before him the condition was so far from being necessary, so far from being written in the will, that without such condition it was a just and reasonable will, and subject to it would be the most unjust of all wills.

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Whether the decision of the last cited case will be followed when the point is again brought before the consideration of a court of equity may reasonably admit of some doubt, since it appears incompatible with the case of *Graves v. Forman*^m, and the above dicta in *Wilson v. Lord John Townshend*.ⁿ Moreover, the condition implied by a testator seems to have constituted the criterion which the courts have adopted in deciding upon the existence of a case of election, without reference to the remoteness or intrinsic value of the subject matter.

In a more recent case the doctrine has been held to extend to the most remote interests, even though such might not have been the intention of the testator.

For where a testator by his will directed that each and every of the person and persons, to whom he had thereby made any gift, devise, or bequest, should accept the same in full satisfaction and discharge of all debts claims and demands upon him, or upon any part of his real or personal estate, or otherwise; and one of the persons who took remote interests in remainder in the testator's real estates after several estates tail, and also an annuity for his life, claimed a balance on an unsettled account for money laid out by him for the testator: the Lord Chancellor said, the decree must direct an election against him,

^m *Supra*, page 184.

ⁿ *Ibid.*

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though clearly not intended by the testator with reference to those remote interests.⁶

It seems to have been decided, that the case of creditors affords an exception to the doctrine of election, though an attempt has been made to bring them within its influence.

For where a testator devised all his estates, messuages, lands, tenements, and hereditaments, except the estates afterwards given to his wife, to trustees, upon trust to sell, and discharge all incumbrances affecting the same, and to invest the overplus of the purchase money, which was to be considered as part of the residue of his personal estate; and gave several messuages and other benefits to his wife for life, and declared that the provision he thereby made should be in satisfaction of her dower; and directed his trustees to invest the residue of his personal estate, after payment of his debts funeral and other expences, in trust for the benefit of his wife and two daughters: on a suit being instituted on the part of the creditors, wherein they succeeded in establishing their claim to the provision made for the wife, in order that the same might be applied towards the liquidation of their debts, it was objected on the part of the widow, that the creditors took a benefit under the will of the testator by the devise for payment of their debts generally, and therefore should not be permitted to disappoint that part of the will by which a provision was made for the widow,— in other words, that the doctrine of election was to be applied to creditors:— but the Master of the Rolls held it to be utterly inapplicable, and that it had never been so applied.⁹

It should however be noticed, that in a recent case Lord Eldon, Chancellor, has observed⁴, that if creditors, claiming satisfaction of their debts out of real estates under the provisions of a will, are disappointing the will by proceeding against property that was intended to be exempted, he

^o Webb v. Earl of Shaftesbury, 7 Ves. 480. ^a See 1 Jac. 115. in Clarke v. Earl of Ormonde.

[¶] Kidney v. Coussmaker, 12 Ves.

would not go the length of saying they could claim the benefit of the devise for their payment, if they were not satisfied with that which the testator had given to them, and which the law had not given to them; nor would he say, that if they would not take the provision made for them by the will, they would not be obliged to take that provision only which they were entitled to by law.

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But where a person stands in the character of both heir and creditor, and in the former opposes an estate's being made liable to debts; yet in the latter character he will be let in upon a fund provided by the will for payment of debts, and not be put to his election.¹

On what
persons it
is not in-
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to elect.

Neither will a person, taking benefits under an instrument creating a case of election, be prevented enjoying derivative interests arising from estates taken in opposition to such instrument, by an application of the doctrine of election.

Therefore a husband, who takes benefits under a will, may also be entitled as tenant by the courtesy to an estate taken by his wife in opposition to that will.²

The consideration of those cases which form exceptions to the doctrine will, in consequence of their similarity to those wherein the doctrine has been held inapplicable, be pursued in a future page.³

III. As to the persons by whom an election may be compelled.

It would appear that all persons, claiming by themselves or others specific interests in property made the subject of election, may compel those who have the right of election to exercise the same:— and accordingly the Lord Chancellor, in *Lady Cavan v. Pulteney*⁴, seems to have inclined to the opinion, that parties claiming to put a person to election must claim specific rights in the property; and therefore that a person claiming merely as creditor to a

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may be
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¹ *Deg v. Deg*, 2 P. Wms. 412. 418.

² See infra, page 230. et seq.
³ 2 Ves. jun. 562.

⁴ *Lady Cavan v. Pulteney*, 2 Ves. jun. 544.

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testator cannot say that parties claiming under the will shall arrange their interests so as to enable him to recover his debt in a particular manner.

And it seems, that if the particular demand of any person taking a benefit under a will subjects the personal estate to a debt, the putting him to an election cannot be enforced by a residuary legatee, his interest not being sufficiently specific; for *ex vi termini*, he is entitled only to what may remain, after all debts are discharged. *

IV. As to the persons by whom an election may be made.

*By whom
it may be
made.*

An election may be exercised by all persons *sui juris*; and when they are not so, then it would appear that such an election is usually made through the instrumentality of the Court, by a reference to the Master.

And it seems, that the right to make an election is such an interest as passes to the assignees of a bankrupt^w; and that where a testator has omitted to exercise an election, the same may be made by his executors.^x

*What the
practice is
when
femes-
covert have
to elect.*

When it has been incumbent on a feme-covert to elect between conflicting interests, some variation in practice seems to have existed as to the manner in which such election should be made: it may be as well therefore shortly to advert to the several decisions upon the subject.

In a case^y where an election was to be made by a feme-covert whether she would take under or against the custom of London, Lord Hardwicke said, she must be present in Court, or, if abroad, something in the nature of a commission should issue, like a *deditimus* in case of a fine. And she and her husband being in Paris, his Lordship directed her to attend certain persons named who resided there, to be by them solely and separately examined as to her election. And on a case being mentioned by the register, where a woman, who had married a second hus-

* See 2 Ves. jun. 561. in *Lady Cavan v. Pulteney*; and 3 Ves. 385. in same. x *Banner v. Low*, cited 2 Fon. Eq. 330. n. (l).
^w *Cumming v. Forrester*, 2 Jac. & Walk. 334. y *Parsons v. Dunne*, 2 Ves. sen.

band, had to elect whether she would take under the will of her first husband, or by the custom; and she and her husband, on coming into court to make the election, differed, whereupon the Master of the Rolls referred it to a Master to see what was most for her benefit; his Lordship pronounced the case to be in point.

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In another case^a a feme-covert was ordered to signify her election by signing the register's book by her clerk in court within a specified period: and the time having been suffered to elapse, it was referred to the Master to inquire, what election it would be most for her interest to make; and on his report coming in, an election was made agreeably thereto.

In *Wilson v. Lord John Townshend*^b, it being very clear which way it would tend most to the advantage of a feme-covert to elect, the Court took upon itself to make the election for her, without any reference to a master.

In *Vane v. Lord Dungannon*^c an election was directed to be made by a feme-covert before the Master within six months from the date of the decree; and the consequences of her electing one way or the other were provided for.

In *Davis v. Page*^d Lord Eldon seems to have impliedly assented to the practice of a reference to the Master, in cases of election by married women. Such reference therefore would now seem to be the generally established practice, subject to any such variations as the circumstances of particular cases may induce the Court to make.

Lord Manners, Chancellor, in alluding to the practice of directing a reference to the Master for ascertaining what election it would be most for the advantage of a feme-covert to make, observed, he never heard of that being done after the death of the wife, or of the party bound to elect.^e

^a *Pulteney v. Darlington*, 7 Bro. P.C. [ed. Toml.] 546, 547. ^c 9 Ves. 350.
^b See 1 Ball & Beat. 25. in 2 Ves. jun. 69. infra, page 215. *Stratford v. Powell*.
^d 2 Scho. & Lef. 133.

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What,
when in-
fants have
to elect.

Where a right to elect has devolved upon an infant, differences also seem to have prevailed as to the time when, and the mode in which, the election should be made.

In *Streatfield v. Streatfield*^e, Lord Talbot ordered the infant heir to elect within six months after he came of age: and in *Hervey v. Desbouverie*^f, his Lordship directed the infant's election to be postponed until twenty-one or marriage.

In *Boughton v. Boughton*^g, it was considered that no election could be made until the infant came of age, she being neither able to judge for herself, nor the Master for her.

In *Bor v. Bor*^h, the Court of Chancery in Ireland decreed an infant to elect within six months after he came of age; but that in the mean time his guardian should elect, and receive the rents of the estates according to the election he might make, which however it was declared should not be prejudicial to the infant.

In *Chetwynd v. Fleetwood*ⁱ, it was referred to the Master, what election would be most beneficial for the infant: and the Master having made his report, the same was adopted by the Court, and the decree confirmed by the House of Lords.

Lord Chancellor Redesdale indeed in citing this case said^j, he had looked into Lord Talbot's own notes, whence it appeared, that it was not conceived to be a matter of question that the party must elect, and must take either under the deed or reject the deed; and that he saw in the reasons annexed to the printed case in the House of Lords, it was not insisted that the infant was not bound to elect, but that, as he was an infant, he could not elect, and that the Court could not elect for him.

* Ca. temp. Talb. 176. infra, ^k 3 Bro. P. C. [ed. Toml.] 173.
page 202. ^l 1 Bro. P. C. [ed. Toml.] 300.
Ca. temp. Talb. 130. ^m See 2 Scho. & Lef. 265, 266.
" 2 Ves. sen. 12.; infra, page 210. in Moore v. Butler.
And see Belt's Supp. 248.

In *Rushout v. Rushout*^k, where it was necessary that an infant should elect between different sums, Lord Cowper decreed her to make the election at eighteen by a writing under hand, which she accordingly did, and the decree was affirmed. Lord Redesdale upon this case has also said^l, that it was considered that the Court was bound to see what was for the benefit of the infant, and make election for her^m, for that otherwise other persons might be prejudiced by the injury for want of that election: but that neither in the reasoning in the case before the House of Lords, nor in Lord Talbot's note on the original hearing, was there any doubt suggested that the infant was bound to elect.

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In *Bigland v. Huddleston*ⁿ, it was referred to the Master to inquire, whether it would be for the benefit of the infant to take under or against the settlement. And in *Gretton v. Haward*^o, two of the children on whom it was incumbent to elect being infants, it was referred to the Master to inquire, what election it would be most beneficial for them to make. Also in *Ebrington v. Ebrington*^p a like reference was directed.

It would therefore seem, that as well in the case of infancy as of coverture, a reference to the Master is the course most generally adopted by the Court, where it is necessary that an election should be made by persons under either of those disabilities; and that, according to the Master's report, a decree will be made for the party to elect.

^k 6 Bro. P. C. [ed. Toml.] 89.

^l See 2 Scho. & Lef. 266. in

appears that the infant herself elected.

Moore v. Butler.

^m 3 Bro. C. C. 285. in note; infra,

— But it seems hard to reconcile this statement with the printed report of the case, by which it

page 195.

ⁿ 1 Swanst. 409.; and see 413. ^o ibid. note (c.)

^p 5 Mad. 117.

CHAP. II.

THE DOCTRINE OF ELECTION CONSIDERED IN APPLICATION
TO CASES ARISING UNDER DEEDS AND WILLS.

We now proceed to the consideration of several cases arising under deeds and wills, to which the doctrine of election has and has not been successfully applied. Those cases however which exclusively relate to the doctrine in application to dower and jointure, and to copyhold property, merit, on account of their great importance, separate heads of inquiry, and will therefore be found to comprise the subject of the two next succeeding chapters.

The contents of the present chapter may be discussed under the following heads :

I. As to the doctrine of election with reference to cases arising under deeds.

II. As to the doctrine of election with reference to cases arising under wills.

III. Consideration of cases arising under wills wherein the doctrine has been held to apply : and,

1. As to those cases where both subjects of election have chiefly consisted of real estate.

2. Where one subject has consisted of real, the other of personal estate, or either of a mixed character.

3. Where both subjects have consisted of personal estate.

IV. Consideration of cases arising under wills wherein the doctrine has been held not to apply, and of cases forming exceptions to the doctrine.

V. As to the commission of what acts do and do not constitute an exercise of election.

I. As to the doctrine of election with reference to cases arising under deeds.

Though by far the greater number of cases involving the doctrine of election has arisen through the instrumentality of wills, yet the doctrine is equally capable of being called into action by deeds or other instruments; therefore we find it said, that no man can claim under a deed or will, without confirming the instrument under which he claims^a; for when he claims under a deed, he must claim under the whole deed together; he cannot take one clause, and desire the Court to shut their eyes against the rest.^b

Lord Chancellor Redesdale, in commenting upon the doctrine of election, said^c, that he saw from a note which he had of a case before Lord Rosslyn, that he had put it thus: — “No person puts himself in a capacity to take under an instrument without performing the conditions of the instrument, and they may be express or implied: if it is stated, or can be collected that such was the intention of the parties to the instrument, that intention must be complied with.”

The following case affords an example of an election originating wholly from a deed.

As where A. by will gave his daughter B. 8000*l.*, directing his trustees to pay 4000*l.*, part thereof, to her younger children upon her death, and if but one child, then to such child; and gave a like legacy to his other daughter in the same manner, and the residue of his personal estate between them: and C. on his marriage with said B. settled an estate to the use of himself for life, remainder to trustees to preserve, remainder to said B. for life, remainder to first and other sons in tail male, remainders over: and B. assigned her 8000*l.* legacy, as to one moiety, to her husband absolutely, and as to the other to trustees, to pay the interest to said C. for life, remainder to herself for life, remainder as to the principal to the younger

^a See accord. in *Freke v. Lord Barrington*, 3 Bro. C. C. 283.

^b See 2 Ves. jun. 696. in *Wilson v. Lord John Townshend.*

^c See 2 Scho. & Lef. 266, 267. in *Moore v. Butler.*

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One claim-
ing under
a deed must
confirm the
whole in-
strument;

and perform
all the con-
ditions
thereof.

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children of the marriage equally, and if but one child, then to such child; and assigned the residue she took under her father's will to the trustees, as to 6000*l.*, to pay the interest to said C. for life, remainder as to the principal among the younger children, if no such children, then as she should appoint, and in default of appointment to her next of kin: and B. died leaving one child, a daughter, and without having made any appointment: — on a bill being filed by the daughter, claiming to be entitled to the 4000*l.* moiety of the 8000*l.* legacy, and also a contingent interest in the 6000*l.* and the trust estate, it was decreed as to the 4000*l.* that the Master should inquire, whether it would be for the benefit of the infant to take under the settlement, or to claim against it.⁴

Another case, though not strictly one of election, but wherein the application of the doctrine to deeds was recognized, is that of *Chetwynd v. Fleetwood*.⁵ The difficulty in the cause arose as to the capacity of an infant to elect for himself⁶; but no doubt seems to have arisen respecting the applicability of the doctrine of election to deeds.

One claiming under an instrument cannot take in opposition thereto.

By a more recent case it has been decided, that if a person be aiding and co-operating in any particular disposition being made of property, to part of which he can make title by virtue of some former instrument, he will not be suffered to claim under the prior title, and at the same time take any benefit under the disposition as to the residue.

This principle is deducible from the case of *Cumming v. Forrester*.⁷ There, by settlement previous to marriage, certain freehold property was conveyed to trustees, upon trust for the separate use of A. the intended wife for life, remainder as to a freehold upper-roomed house, upon trust to convey the same to her natural daughter B. a feme-covert in tail. The marriage having taken effect, the husband

⁴ *Bigland v. Huddleston*, repd. ⁵ See supra, page 192. as to infants being put to election.
³ *Bro. C. C.* 285. in note. ⁶ 1 *Bro. P. C.* [ed. Toml.] 300. ⁷ 2 *Jac. & Walk.* 334.
² *Scho. & Lef.* 265, 266. in *Moore v. Butler*.

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afterwards died, leaving his wife surviving; and under the impression that the trusts of the settlement had ceased, the surviving trustee thereof reconveyed the settled property to A. absolutely. B. died in her mother's lifetime, leaving one son C., and one daughter D., surviving her. A. afterwards by her will devised all her property, mentioning among the rest her upper-roomed house, to be sold, and gave one moiety of the money to arise from the sale, after payment of debts and legacies, to C., and the other moiety to D.; but the will having been attested by two witnesses only, it was conceived that the real estate had escheated to the crown. Upon this C. and D. concurred in petitioning the crown for a grant of the property upon the trusts of the will; and accordingly by letters patent the same was granted to trustees, upon trust to sell, and after payment of such part of the funeral charges of A. as might remain unsatisfied, to pay a moiety of the residue to C., and to remit the other moiety, in order that the same might be invested upon certain trusts for the benefit of D. and her children. The property was accordingly sold. Previously to the date of the letters patent, the upper-roomed freehold house had been sold, and the proceeds paid to C. The rest of the property was afterwards sold; and C. having become bankrupt, part of the proceeds was paid to his assignees, the residue having been paid into court. The assignees, as representing C., made claim to more than a moiety of the proceeds arising from the sale of the whole of the property, making title in fact both under the settlement and grant: but on a bill being filed by D., calling upon the assignees to elect whether they would take by the grant, or claim under the settlement of A., they were held bound by the acts of C. to claim under the grant. And the Master of the Rolls observed, that it was certainly contrary to every principle of equity for a person to induce a gift to be made to himself and another in moieties, and then to set up an adverse claim to a part:—that in this case there was a feature in addition to the ordinary cases of election, the party himself having co-operated

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in inducing the crown to make the grant:—that this circumstance did not occur in general with wills and deeds; though they were made without the knowledge of the party, he was put to his election; but that in this case the grant was made with his approbation; he informed the crown that the property had escheated:—that it was impossible to say that this party, having by his representations induced the crown to make the grant, could set up a title against it:—that it would be contrary to all analogy to the doctrine of election.

**As to elec-
 tion arising
 under wills.**

**One claim-
 ing under a
 will shall
 give effect
 to every
 thing con-
 tained in it.**

II. As to the doctrine of election with reference to cases arising under wills.

The principle of the doctrine of election in application to wills fully establishes this proposition; that no man shall claim any benefit under a will, without conforming, so far as he is able, and giving effect to every thing contained in it, whereby any disposition is made showing an intention that such a thing shall take place. What the testator's powers were, and what his conduct would have been supposing him to have possessed an accurate knowledge of those powers at the time of making his will, is an inquiry not to be entered upon; but his intention, as capable of being collected from his will, must it seems constitute the sole governing principle; and the question in most cases will be, whether the testator intended the property to go in the manner indicated by the instrument declaratory of his intention; for whether he conceived himself fully competent to do that which he has taken upon himself, or being aware of the extent of his authority, yet intended by an arbitrary exertion of power to exceed it, no person taking under the will shall defeat its disposition.^h

**Principle
 of election.**

If then a man does by will more than he has strictly a right to do, and gives a bounty to the person to whose prejudice that is done, the person prejudiced by one part shall

^h See 4 Bro. C. C. 24. in Blake in Whistler v. Webster; 13 Ves. v. Bunbury; 1 Ves. jun. 370, 371. 221. in Thellusson v. Woodford.

not insist upon his right, and at the same time upon the bounty by the will.¹

Lord Northington C. in alluding to the doctrine of election observed, that it should appear the testator knew he had no right to dispose of the lands, and yet that knowing it he took upon himself to dispose of them:—that there was no instance where general words had been held to come within the rule; and he did not see how the testator's intention could be collected with sufficient certainty from them. And his Lordship conceived, that the doctrine ought to be confined to plain and simple devises of the inheritance, and could not be extended to limitations. It will be seen however in the progress of this inquiry, that these remarks are not altogether tenable, and borne out by subsequent authorities.

With regard to the degree of intention requisite to the raising a case of election by will, the disposition by the testator of what he had no right to dispose of must appear upon the face of the will by declaration plain, or by necessary conclusion from the circumstances disclosed by the will; for no man is to be deprived of his property by guessing or conjecture. On the other hand, the Court is not to refuse attention to what amounts to a moral certainty of the testator's intention, where that is to be gathered either from the state of the property, or the purview of the will.²

In every case of election, there must be an intention to dispose of that over which the person has no power of disposition:—that is the circumstance that creates election.³ And it must appear upon the face of the will that the tes-

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tion to wills.

As to the
requisite
degree of
intention
and cer-
tainity to
raise a case
of election.

¹ See 2 Ves. sen. 618. in Clark v. Guise.

agree to the position laid down in the general sense of it, that where a man gives all his estate, he does not mean to give what is not his: that what he thinks his is, in the sense he uses the word, his. See

6 Ves. 400. in Druce v. Denison.

² See Ambl. 590. in Forrester v. Cotton; and 1 Eden's Rep. 535, 536.

Per Lord Erskine C. in Thel-

24. The same learned Judge is reported to have said, he did not

lussion v. Woodford, 13 Ves. 222.

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On whom
 the onus of
 making out
 a case of
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 rests.

Consider-
 ation of
 cases.

Where sub-
 jects of
 election
 have chiefly
 consisted of
 real estate.

Where a
 devisee
 must elect
 between his
 own estate
 and some
 compen-
 satory in-
 terest.

tator purposes there should be an election, and as to what subject.^m

Prima facie, it is not to be supposed that a testator disposes of that which is not his own: — it must be by demonstration plain, by necessary implication, meaning by that the utter improbability that he could have meant otherwise but that the case is raised: — and it rests upon those contending for a case of election to show, that there is that manifest plain demonstration, and utter improbability.ⁿ

III. Consideration of cases arising under wills wherein the doctrine has been held to apply.

1. As to those cases where both subjects of election have chiefly consisted of real estate.

If a testator by his will makes a disposition of his own estate, and also takes upon himself to dispose of the estate of another, and creates an interest in favor of the person to whom such estate either wholly or in part belongs; that person cannot take as well his own estate, of which the testator has assumed a power to dispose, as also his interest under the will, if his so doing would be inconsistent with the will, but must elect between the two, and abandon either the one or the other.

Or, to state the proposition in other terms, and as warranted by the decision of the next cited case; if one, taking upon himself to be absolute owner of an estate, when he is not so, devises it away, and gives an estate, whereof he is absolute owner, to the person claiming a remainder in tail in the other estate; a court of equity will not suffer that person to have both estates, by claiming in contradiction to the will in another part.^o

As where a testator having two daughters, A. and B., devised to A. his lands in C. and 800*l.*, and to B. his lands in D. and E. and 1,300*l.*, on condition that she released

^m Per Lord Eldon C. in Doe v. See 1 Ves. sen. 260. in Kirk-Chichester, 4 Dow's P. C. 65. ham v. Smith.

ⁿ Per Lord Eldon C. in Ranchiffe v. Parkyns, 6 Dow's P. C. 179.

the lands in C. to her sister; and also bequeathed to B. 1,300*l.*; and provided that if he had another daughter, then he gave the 800*l.* bequeathed to A. to such after-born daughter; and directed that the lands at D. and E., and the 1,300*l.* bequeathed to B., should be equally shared by her and such after-born daughter; and died leaving his wife *enceinte* of a third daughter, who afterwards claimed not only the lands devised to her, and a moiety of what was devised to her sister B., but also a moiety of the lands devised to A., (and which on the testator's marriage had been settled on himself for life, remainder to his wife for life, remainder to his first and other sons, remainder to the heirs of his body): on the question whether she ought not to elect between the benefits under the will, and the interest she had independently thereof, it was decreed she should do so, the Lord Keeper observing, that where a man was disposing of his estate among his children, giving fee-simple lands to one, and lands entailed or under settlement to another, it was upon an implied condition that each party released the other, especially where the testator had the distribution of his whole estate under consideration, and might have cut off the entail.^p

If a testator assumes the power of disposing of the estate of another, whether under the supposition of the same belonging to himself, or possessing knowledge to the contrary; and by his will gives benefits, either of a certain or precarious nature, to him whose property he so disposes of; these circumstances afford a case of election; and if the person put to election chooses to abide by his own estate, compensation^q must be made out of the benefits intended for him to the person for whom his own estate was intended, according to the value thereof.

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considered
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tion to wills.

Case of
election
will be
raised,
though the
interest li-
mited in
the free pro-
perty to the
person put
to election
be pre-
carious.

^p *Noys v. Mordaunt*, 2 Vern. 581.; and see Mr. Raithby's note, *ibid.* 582. [2. ed.] *Gilb. Rep.* in Eq. 2. Lord Eldon C. in alluding to this case observed, that it was usually considered as the first,

though he rather thought it was not the first case on the subject. See 6 *Dow's P. C.* 179.

^q See more concerning compen-
sation, *infra*, Ch. V.

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 tion to wills.**

These principles are deducible from the case of *Sreatfield v. Sreatfield*.¹ There A., by articles previous to his marriage, agreed to settle lands to the use of himself and his intended wife for their lives, and the life of the survivor, remainder to the heirs of his body by his said wife, remainders over; and by settlement after marriage, reciting the articles, the lands were limited to the said A. and his wife for their lives, and the life of the longest liver of them, remainder to the heirs of the body of the said A. by his said wife, remainder to the right heirs of the said A. There was issue of the marriage, one son and two daughters; and A., after his son's death, levied a fine of the lands comprised in the settlement to the use of himself in fee; and afterwards by his will devised part of those lands to his two daughters, and all his other lands, (including the residue of those whereof he had levied the fine,) to trustees, in trust for the plaintiff, his grandson, for life, remainder for the sons and daughters of the plaintiff successively in tail, remainders over; and directed his said trustees to receive the rents, and allow what was necessary for the plaintiff's education, and place the residue out at interest in trust for the plaintiff at twenty-one; and if he died before that age, in trust for said testator's two daughters: — and the Lord Chancellor, after deciding that the settlement was not a due performance of the articles, under which the plaintiff was entitled to an estate tail, said, that if the plaintiff had a lien upon the lands comprised in the articles, then he might stand to them if he pleased; but that when a man took upon him to devise what he had no power over, upon a supposition that his will would be acquiesced under, the Court compelled the devisee, if he would take advantage of the will, to take entirely, but not partially, under it, as was done in *Noys & Mordaunt's* case: — that the only difficulty in the present case was, that what was given to the plaintiff was precarious, nothing being given to him if he died before twenty-one, and if

¹ Ca. temp. Talb. 176.

* Supra.

after, then but an estate for life; and that the plaintiff appeared before the Court in the favourable light of being heir at law; but that this would not alter the case. And it was decreed that the plaintiff should have six months after he came of age to make his election, whether he would stand to the will or the articles; and that if he elected to stand by the latter, then so much of the other lands devised to him, as would amount to the value of the lands comprised in the articles which were devised to the daughters, should be conveyed to them in fee.

Again, where a testator gave a copyhold estate to A. and B. his wife for their lives, and the life of the longest liver of them, with remainder over in fee; and desired that the survivor of the said A. and B. would, at his or her death, give certain premises belonging to them to the plaintiffs, in like manner as he had given the copyhold estate: the Lord Chancellor observed, that the testator having disposed of the estate of another person, giving that person other property, the party taking the property disposed of must give up that which was given in exchange for it, to reimburse the devisee for his disappointment; and that every thing A. and B. took should be brought into Court, as a security for the purposes of the will.¹

If a testator devises an estate to his heir at law, which he would take by descent if no will was made; and then devises to another person an estate of which the heir is seized in his own right; he will not be permitted to take under the will, without giving effect to the devise of his own estate, though he would take by descent if there was no will.

Therefore we find it to have been laid down, that where a father, disposing of his estate, happens to give a younger son what was settled on the elder, and at the same time gives the elder some other provision; an implied condition is annexed to the devise, that if the elder defeat the will in any part, he shall not at the same time take any benefit

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Cases
wherein the
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will be put
to an elec-
tion.

¹ Lewis v. King, 2 Bro. C. C. 600.

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under it, for it is inequitable to claim any benefit under a will, and at the same time overturn it, and prevent its taking effect according to the intention of the testator.^u

The application of the doctrine of election under these circumstances seems to have been first applied in a case, where a testator, being seized of two acres, one in fee and the other in tail, and having two sons, devised the fee simple acre to his eldest son, who was issue in tail, and the tail acre to his youngest son; and on the father's death, the eldest son entered upon the tail acre, whereupon the youngest son brought his bill to recover the same, or to have an equivalent out of the fee acre: and the Lord Chancellor accordingly decreed, that the devise being designed as a provision for the youngest son, the devise of the fee acre to the eldest son must be understood to be with a tacit condition that he should suffer the youngest son to enjoy quietly, or else that the youngest son should have an equivalent out of the fee acre.^v

This case was followed by *Welby v. Welby*^w, where a testator, being seized as tenant in tail of lands at Pointon, and as tenant for life of the manor of Sapperton, with the reversion in fee, expectant upon estates tail to his first and other sons, and other intermediate estates, and being also seized of the fee in other estates, devised a portion of the latter to his eldest son in fee, and all other his manors, lands, &c., including those at Sapperton and Pointon, to trustees; as to part, including the Sapperton and Pointon estates, to the use of his grandson, the plaintiff, for life, with remainders over; and as to the residue, to the use of his eldest son, the defendant, for life, with remainders over:—and the question being whether the son was bound to make an election between the estates devised to him by his father in fee, and the Sapperton and Pointon estates, he was held compellable to do so, the will having been previously decided to comprehend the entirety of the Sapperton and Pointon estates. And the Master of the Rolls

^u *Bor v. Bor*, 3 Bro. P. C. [ed. Toml.] 167. 177, 178.

^v *Anon, Gilb. ca. in Eq. 15.*
^w 2 Ves. & Bea. 187.

said, that independently of the last case, he should have thought it perfectly clear, that an heir, to whom an estate was devised in fee, might be put to an election, although by the rule of law a devise in fee to an heir was inoperative; for that if the will was in other respects so framed as to raise a case of election, then not only was the estate given to the heir under an implied condition that he should confirm the whole of the will, but that in contemplation of equity the testator meant, in case the condition should not be complied with, to give the disappointed devisees, out of the estate over which he had a power, a benefit correspondent to that of which they were deprived by such non-compliance. So that the devise was read as if it was to the heir absolutely, if he confirmed the will; if not, then in trust for the disappointed devisees as to so much of the estate given to him, as should be equal in value to the estates intended for them.*

What that degree of intention is which it is requisite should be disclosed by a testator in order to promote a case of election may often prove nice matter of inquiry, and must depend upon the evidence deducible from a consideration of the entire will. In the subjoined case, the dispositions and expressions contained in the will were held sufficiently strong to give rise to a case of election.

The case to which allusion is made was as follows: — by articles previous to the marriage of A. with B., the real estates of the latter were covenanted to be settled to the use of her father for life, remainder to trustees to preserve, remainder to A. for life, remainder to trustees to preserve, remainder to B. for life, remainder to trustees to preserve, remainder to the children of the marriage as A. should by deed or will appoint, remainder to them equally as tenants in common in tail, with cross remainders in tail, remainders over: and by other articles, A.'s estates were covenanted to be settled to the use of himself for life, remainder to the

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tion to wills.

Principle
of compen-
sation.

As to the
requisite
degree of
intention to
promote a
case of
election.

* This judgment, it will be observed, furnishes a clear definition of the principle of compensation, as to which see infra Ch. V.

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intend B. might receive a rent-charge for her jointure and in bar of dower, remainder to trustees for a term of years for better securing the same, remainder to the first and other sons of the marriage in tail male, remainder to such uses as B. should by deed or will appoint, remainders over: — the marriage afterwards took effect, but no settlement was made pursuant to the articles; and there being several sons and daughters, A. by his will directed the trustees thereof to permit B. personally to occupy the mansion house on the estate, for life, or until one of the testator's sons came of age; and after reciting the articles for the settlement of his own estates, and the power of appointment thereby reserved to him, which he described as a power intended to be exercised by his will, and reciting that no settlement had been made pursuant to the articles, he thereby confirmed the same, and directed them to be performed. He then, without mentioning the articles for the settlement of B.'s estates, devised to her part of the property comprised therein; and, by virtue of every power enabling him in that behalf, devised all the estates comprised in the articles for the settlement of his own estates, and all other the manors, hereditaments, and real estate both freehold and copyhold belonging to him, or over which he had a power of appointment, to trustees for 500 years, for raising 5,000*l.* as a portion for each of his younger children; and subject thereto, he gave all his estates to such uses and trusts and with such powers as by the said articles were limited and declared: and the will contained a direction, that all persons claiming under the same should, under the doctrine of election, be bound to give effect to every disposition therein contained. On this case one of the questions being, whether the will operated as an appointment of the estates comprised in the articles for the settlement of B.'s estates, and consequently involving the question whether a case of election was raised against the children as to those estates, his Honor the Vice-Chancellor held, that the circumstances of the testator having recited the power of appointment over his own

estates, and yet made a disposition inconsistent therewith, and the expression that all persons claiming any benefit under his will should be bound by the doctrine of election, afforded evidence of intention against the argument for excluding the wife's estate from the operation of the power.^y

2. Where one subject of election has consisted of real, the other of personal estate, or either of them of a mixed character.

The foregoing cases furnish examples of the doctrine of election where both the subjects of it chiefly consisted of real estate; but the doctrine is equally applicable to cases, where one of the subjects only is real estate, and the other personal, or either of them is of a mixed character.^z

As where a testator, as executor to his father-in-law, was indebted to one of his sons, the plaintiff, in the sum of 250*l.* together with some interest thereon, and by his will gave him the 250*l.* only, and gave the interest thereof to his executor, in satisfaction of money the testator had laid out for the plaintiff, to whom the testator gave certain legacies, and also devised a close in fee; and the plaintiff afterwards brought his bill for the 250*l.* and such interest as he was entitled to thereon: — the cause coming before the Lord Chancellor on appeal from the Rolls, he decreed that the plaintiff should make his election, whether to take under the will; and to waive the interest of the 250*l.*, or to have the interest, and waive the advantage of the devise; having previously observed, that by his will the father might impose what terms he pleased upon his disposition, according to the rule in *Noys v. Mordaunt's case*^x, which was applicable to the case before him, it being unreasonable to take a will by halves, and not to be supposed that the testator would have made the bequest, had he known that the terms upon which he made it would not be complied with: — that the testator never intended the plaintiff should have the interest, and likewise

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Cases
wherein
one subject
of election
has con-
sisted of
real, the
other of
personal
estate, or
either of a
mixed cha-
racter.

A will not
to be taken
by halves.

^x Trollope v. Linton, 1 Sim. &

* See accord. 1 Ves. sen. 255.

Stu. 477.

in Cooke's v. Hellier.

^z Supra, page 201.

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 tion to wills.*

take advantage of the devise of the close, and of the sum given him. And his Lordship added, he did not think there was any difference where the devise was of money only, and where it was partly of money and partly of land : — that in *Noys v. Mordaunt's case*, although land was by the will given in satisfaction of land, which might be said to differ it from the case before him, yet that the land was of a different nature, which brought it to the same thing as it was there.^b

In what cases a court of equity will rectify the limitations of a marriage settlement.

Where articles are entered into previous to marriage, the limitations whereof are of a nature to constitute the husband tenant in tail of the property agreed to be settled ; and a settlement is made either before or after marriage expressly in pursuance of the articles, and adopting the limitations contained therein ; the Court of Chancery will in such case interfere to rectify the settlement, by considering the words in the articles as words of purchase and not of limitation, and accordingly decree a settlement upon the first and other sons of the marriage.^c But if the husband levies a fine, thereby acquiring a fee in the estate, and afterwards affects the same by some disposition contained in his will, and the son, who is to take under the limitations of the settlement when rectified, takes also a benefit under the will, he will not be permitted to take under both those instruments, but must elect between them.

Case of election connected therewith.

Thus, where by articles before marriage an estate was agreed to be limited to the husband for life, remainder to the heirs male of his body, with power to raise portions for children ; and a settlement was made before marriage in pursuance of the articles, and observing the very words thereof ; and the husband afterwards levied a fine, declaring the uses to himself in fee, and by his will made a provision for payment of his son's debts ; and subsequently the son brought a bill to have the settlement rectified according to

^b *Jenkins v. Jenkins*, repd. Belt's Supp. to Ves. sen. 250. And see in *Fearne on Cont. Remrs.* page same case stated in *Clark v. Guise*, 98. et seq. 2 Ves. sen. 617.

^c See accord. the cases collected

the intent of the articles, which was to make the father tenant for life only: it was decreed, that though he was entitled to this relief, yet having submitted to take a benefit under his father's will, he could not retain that, and also take an interest under the rectified settlement, but must elect between the two.^d

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tion to wills.

Again, where A. succeeding to an estate as tenant in tail under the limitations contained in his father's will, and supposing he had power to dispose of the estate, made a settlement of it by lease and release upon his daughters and their issue, remainder over; and at the same time made his will, and thereby gave legacies to the plaintiffs, and directed that his wife should live at his mansion-house with his daughters;—and on A.'s death, the plaintiffs claimed the estate under a remainder contained in their grandfather's will: one of the questions made was, whether they should take both the legacies, and the estate under the remainder: and it was decreed, that if they claimed in contradiction to the will by taking under the remainder, they must waive the legacies; the Lord Chancellor observing, that though this was not the same case in specie and form with *Noys v. Mordaunt*^e and *Vincent v. Vincent*, being a middle case, yet it fell within the same reason:—that here the real estate was by the settlement, but that the settlement and will, under the circumstances of the case, were to be taken as one entire disposition, and both were revocable:—that by the will, the testator made a disposition of part of the real estate, which, if to take place, would break in upon the plaintiffs' remainder in tail, viz. the devise of the benefit of the house to the wife.^f

Case of
election
through the
intervention
of two in-
struments.

If a person takes upon himself to dispose by his will of the freehold estate of another, to whom he bequeaths a personal legacy, but to which no condition is annexed that the legatee shall enjoy it only upon the terms of giving effect to the will, and the will is not adequate to pass the

Case
wherein a
legatee will
not be com-
pelled to
elect be-
tween his
own estate
and a le-
gacy.

^d *Roberts v. Kingsly*, 1 Ves. sen. ^e *Supra*, page 200.
238. And see *Fearne on Cont.* ^f *Kirkham v. Smith*, 1 Ves. sen.
Remrs. 104, 105. 258.

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Cases
wherein he
will be so
compelled,
by reason
of a con-
ditional
legacy.

*Election
by infant.*

estate for want of an observance of the ceremonies required by the statute of frauds ^g, and consequently cannot be read so as to support a disposition of freehold estate; in this case the Court cannot attach such a condition to the legacy by implication, so as to create thereby a case of election.^h

But if in such case the legacy is given upon the express condition that the legatee shall give effect to the testator's will, though the same is not calculated to pass freehold estate for want of due formalities, the Court will nevertheless compel such legatee to elect between his own estate and the legacy, and not suffer him to enjoy both.

Therefore where a testator devised his real estate to a younger son, and bequeathed his personal estate among his children, and gave to A., his eldest son's daughter, £2000. upon some contingencies, and inserted a clause to the effect that if any persons to be benefited by his will controverted the same, or any codicils thereto, they should forfeit all claim under the will; and it appeared that the will was neither subscribed by the testator, nor by any witnesses; but the testator afterwards made a codicil, wherein he recognised the will; and A., by her father's death, became heir at law to the testator, and as such entitled to whatever descended in consequence of the informality of the will:—on the question whether A. must not elect between the descended property and the personal legacy, the Court held it incumbent upon her to do so, distinguishing the case from that of *Hearle v. Greenbank*ⁱ, by reason of the express clause in the will. But A. being an infant ^j, and the contingencies on which the legacy was bequeathed being such that neither she nor the Master could judge which of the two subjects of election it would be most advantageous for her to take, the period for electing was put off until she came of age.^k

^g 29 C. 2. c. 5.

^h See accord. *Hearle v. Greenbank*, 5 Atk. 695. and infra.

ⁱ Infra, page 226.

^j See sup. page 192. as to the

practice on infants being put to election.

^k *Boughton v. Boughton*, 2 Ves. sen. 12.

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tion to wills.

The distinction taken in this case between express and implied conditions, though now well established, yet does not seem to have met with the cordial approbation of all succeeding Judges; for the Master of the Rolls in *Brodie v. Barry*¹ is made to say, that he did not understand why a will, though not executed so as to pass real estate, should not be read for the purpose of discovering in it an *implied* condition concerning real estate annexed to a gift of personal property, as it was admitted it must be read when such condition was *expressly* annexed to such gift: for that if by a sound construction, such condition was rightly inferred from the whole instrument, the effect seemed to be the same as if it were expressed in words.

So if there be no devise of real estate, but a personal legacy is given on *express* condition that the legatee shall not enjoy it, unless within a certain time he conveys a real estate, whether coming from the testator or not; he shall not enjoy it but upon those terms, the lands not passing by force of the will, but from the operation of the clause; and the legatee has it in his power whether he will part with the land or not.^m

Cases of
express
condition as
distinguis-
able from
those of
election.

Again, if there be a devise both of real and personal estate, and the will is sufficient to pass only the personal, but a condition is annexed that the personal legatee shall permit the persons to whom the land is given to hold to them and their heirs; the condition annexed will take place, though the devise be void as to the lands, for the legatee cannot take in contradiction to the testator's words.ⁿ

If a wife be entitled to a provision under her marriage settlement, and the husband devises a real estate to her, and also bequeaths to her some personalty, expressing such benefits to be in bar of her claims under the settlement, and the will is not executed so as to pass freehold estate,

Wife put to
election by
express
terms of
will, though
prevented
taking part
of the free

¹ 2 Ves. & Bea. 150. And see ^m Per Lord Hardwicke C. in the observations of Lord Eldon C. *Boughton v. Boughton*, 2 Ves. sen. in *Ker v. Wauchope*, 1 Bligh's P.C. 14, 15.

23. ⁿ Per Lord Hardwicke C. in same case.

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property
intended
for her.

Cases of
election
arising
from ex-
press terms
of will.

whereby the wife is prevented taking both the benefits intended for her; yet she must elect between the provision under the settlement and the personal estate, and will not be permitted to enjoy both.

As where upon marriage an estate was limited to the husband for life, remainder to the wife for life, remainder to the issue; remainder to her in fee; and the husband by his will devised another estate, and bequeathed the residue of his personality to his wife for life, in bar of her claims under the settlement; and the will was not attested so as to pass freehold estate: — on the question whether the widow should take both her interest under the settlement, and also the personal estate under the will, it was decreed she should elect between them; but the period of election was postponed, until an account had been taken of the personal estate. ^o

Where a testator devised all his real estates to the use of his daughter for life, remainders over; and ordered his personal estate to be laid out to the same uses; and by his will declared that all the annuities therein given should be in full satisfaction of all demands the respective takers had upon him, except servants' wages; and the daughter was entitled under her father's marriage settlement to a sum of 10,000*l.*: the Lord Chancellor, after ruling that the testator had given his whole fortune so that as to the daughter it operated as an annuity, decreed, that the 10,000*l.* being within the compass of the will, she could not take the benefits given to her under the will, but upon the terms of extinguishing her claim under the settlement, and that she must elect to take under or against the will. ^p

One of the points of decision in the case of *Pitt v. Jackson*^q also had reference to the doctrine of election. There, on marriage, the real estates belonging to the wife, including some copyholds, were conveyed to trustees to her se-

^o *Newman v. Newman*, 1 Bro. C. C. 186. observed, is more properly one of satisfaction.

^p *Macnamara v. Jones*, 1 Bro. C. C. 481. This case, it will be ^q 2 Bro. C. C. 51.; and see *Smith v. Lord Camelford*, 2 Ves jun. 698.

parate use; and there being issue of the marriage, two daughters, upon whom the copyhold estates devolved, the father by his will directed, that his daughters, and all persons claiming under them, should do every necessary act for settling those estates in the same manner as he had settled some other estates. And inasmuch as the daughters took certain benefits under their father's will, it was decreed, that after certain accounts should have been taken, they should elect between those benefits, and the copyhold estates, of which he had assumed the power of disposing.

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Where upon marriage the husband covenanted that 1,000*l.*, part of the wife's fortune, should be invested at interest, in trust for himself for life, and if he survived his intended wife, (as the event happened,) upon trust to pay the 1,000*l.* as she should appoint, and in default of appointment, as the same would have gone by the statute for distribution of intestate's effects, had she died sole and unmarried; and the 1,000*l.* not having been laid out, and the wife being dead, leaving one daughter, the husband by his will, after noticing that the 1,000*l.* had not been laid out, in lieu of the performance of his covenant devised his freehold and copyhold estates to trustees, in trust, after payment of an annuity of 20*l.*, to apply the rents towards the daughter's maintenance till twenty-one, and then to convey the premises to her in fee, all which premises would be worth considerably more than 1,000*l.*; and after giving certain legacies bequeathed the residue of his personal estate in like manner; this case was held to be one of election, the Lord Chancellor observing, that it could not be in contemplation in a marriage settlement, that, the wife should die unmarried, and therefore declaring, that the daughter, having elected to take under the will, was entitled to the real estate instead of the 1,000*l.*, and also to the personal estate.^r

If a testator, conceiving himself to have an absolute interest in property, but being in error upon that point,

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election
raised,

^r Hoare v. Barnes, 5 Bro. C. C. 316.

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though the person creating the election and the person put to election be not conusant of their rights.

Modifica-
tion of doc-
trine where
testator de-
vises prop-
erty sub-
**ject to in-
cum-
brances, &c.**
**free there-
from.**

having in fact only a partial interest therein, by his will gives certain benefits to another, who is also entitled to a partial interest in such property, but is not at the time conusant of his right; he will not be allowed to take as well such benefits, as also his interest in the property over which the testator was supposed and assumed to possess an absolute control, but must elect between them.

This was one of the points of decision in the case of *Finch v. Finch.** There a testator, being entitled under a settlement to a life estate in certain lands, with remainder, after certain intermediate remainders which did not take effect, to his sister for life, remainders over, by his will and codicil gave annuities to his sister, and devised all his lands to his wife in fee; and there was strong evidence that he and his sister considered him as having the fee-simple of the lands, wherein he had only a life estate: and it was held, that the sister must elect either to take under the settlement, whereby she acquired a life estate in the lands, or under her brother's will.

It is only a modification of the general rule as to election, that where a testator, who has in his lifetime subjected his property to particular limitations or incumbrances, afterwards devises it free from the incumbrances, or under different limitations: the incumbrancers, deriving other interests under the will, if they take by it must not disappoint it, but permit the property to go in the new channel, and as free from incumbrances as the testator intended.

Thus where by marriage settlement the intended husband granted to trustees a rent-charge of 2,000*l.* payable half yearly out of his estates in the island of St. Christopher, in trust for the first son of the intended marriage in tail male, remainders over; and by his will devised all his real estates in St. Christopher and Great Britain to trustees, in trust to convey the same for 500 years; and subject thereto, to the use of the plaintiff, his eldest son, for life, remainder to trustees to preserve, remainder to the plaintiff's first

* 4 Bro. C. C. 58. 1 Ves. jun. 534.

and other sons in tail, remainders over; and ratified and confirmed the settlement, whereby his younger children were entitled to 20,000*l.* in equal portions, so far as the same related to his said children: on the question whether the plaintiff should be entitled to take the rent-charge under the settlement, and the estates subject to the rent-charge and other benefits under the will, or should be put to his election between them, the Court decreed him to elect, observing that the testator had made a disposition inconsistent with that made by the settlement, and that there was strong evidence of particular intention to make the provision in the way he had done; and that by the words he had used, he must be taken to have known of the settlement.^t

It has been already intimated, that when a right of election devolves upon a married woman, a reference is usually made to the Master to inquire which way it will be most advantageous for her to elect.^u But where it is manifestly clear that it will be most for her benefit to elect one particular way, the necessity of such reference will it seems be superseded.

As where a testatrix bequeathed an annuity of 200*l.* to the separate use of A. the wife of B. for life, and took upon herself to dispose of an estate to which the said A. was entitled as tenant in tail in remainder, and which fell into possession soon after the testatrix's decease, and the value whereof considerably exceeded that of the annuity; the Court held it to be so very clear that the election must be against the will, that it was not worth a reference. And in the circumstance of the bequest being made to A. for her separate use, the Court observed it saw no distinction upon which it could break in upon the rule in any degree.^v

If a person, having a right of election to exercise between two subjects of property, effects an incumbrance upon one

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considered
in applica-
tion to will.

Court will
in some
cases elect
for a mar-
ried wo-
man with-
out a
reference.

Case
wherein
one subject

^t Blake v. Bunbury, 4 Bro. C.C. 21. 1 Ves. jun. 514.; and see 6 Dow's P. C. 185.

^u See supra, page 191.

^v Wilson v. Lord John Townshend, 2 Ves. jun. 693.

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of election
 must be in-
 demnified
 by the
 other.

of them, and by so doing is not considered to have made such an election as is conclusive upon him, and afterwards elects to take the other subject; the incumbrance to which the former is made liable must be indemnified by the latter.

As where a testator devised a copyhold estate in trust to be sold, but to which he had never been admitted, nor consequently made any surrender thereof to the use of his will; and bequeathed to his eldest son and heir an annuity of 300*l.* for life, to be secured by an investment of a competent sum to arise from the conversion of his real and personal estate into money; and upon the testator's death the son procured himself to be admitted to the copyhold, and obtained possession thereof, and mortgaged the same for securing 700*l.*; and while resident abroad received half a year's payment of the annuity: the Lord Chancellor said he must make the decree conditional, that the son was bound to elect; and that if he took the annuity, then the trustees of the will must pay off the mortgage, and apply to retain the money arising from the annuity that was in their hands; and that the heir should be allowed the fines he had paid on admittance.—In this case we observe, that neither the mortgage of the copyhold, nor one half year's receipt of the annuity, was, under the circumstances, deemed a conclusive election of either of those subjects.*

**Case of
 election
 raised by a
 general dis-
 position
 made of
 property.**

If a testator, conceiving himself to be entitled to the property of another person, comprises the same under a general disposition of all his estate, giving certain benefits to that person; he will be compelled to elect between his own property and those benefits.

Therefore where a husband, supposing himself entitled under a deed which was held to be void to a residue bequeathed to his wife, made a general disposition thereof by his will, under which she took an interest, this was held to be a case of election; and an election on her part to take the interest under the will, which, though less in point

* Rumbold v. Rumbold, 5 Ves. 65.

of value, was to her separate use, was held to be conclusive upon the assignees under the bankruptcy of her second husband.^x

A case both of election and satisfaction^y may also arise under the same instrument.

As where upon marriage several sums belonging to the wife were directed to be paid to trustees, and invested in lands, to be settled to the use of the husband for life, remainder to the wife for life, remainder to the children as the husband should appoint, remainder as the wife should appoint, remainder to the children equally; and part of one of the trust funds was laid out in purchasing the manor of C., which was conveyed to the uses of the settlement, and the remainder of that particular fund was received by the husband; and 1000*l.*, another part of the trust funds, was paid to the trustees, and invested in their names; and the remaining trust funds were received by the husband, and mixed with his own money; and he by his will made provision for all his children, and directed their maintenance and education during minority to be taken from the whole produce of his real and personal estate; and also empowered his executors to sell the manor of C. if necessary, and apply the produce, during his eldest son's minority, to any purpose they should judge most for his advantage; and devised all the residue of his estate and effects to such eldest son: — the Lord Chancellor observed the case was not precisely like any former one, being neither purely a case of satisfaction nor election: — that as to the manor of C., it was a case of election; as to the sum mixed with the testator's property, a case of satisfaction; and that as to the money actually vested in the trustees, it was also a case of election, there being strong reason to say that the will itself manifested the testator meant it should pass as personal estate.^z

If a testator by his will directs, that in case he shall afterwards contract for the purchase of any property which

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Case both
of election
and satis-
faction.

Case of
heir at law
being put

^x Rutter v. Maclean, 4 Ves. 551. ^y Pole v. Lord Somers, 6 Ves.

^y On the doctrine of satisfac- 509.
tion, see *infra*, Chap. VI.

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**to election
 where free-
 hold pro-
 perty was
 acquired by
 testator
 after mak-
 ing his will.**

shall not be conveyed to him previously to his decease, the same shall be subsequently conveyed in a certain specified manner; and the mode pointed out by the testator for the conveyance of the property is such as to preclude his heir at law from taking any interest therein, but certain benefits are communicated to him by the will: — though the after-purchased property cannot pass by the will in consequence of the statute of frauds ^a, but must descend upon the heir, yet he will not be permitted to enjoy both the property so descended and the benefits he takes under the will, but must elect between them.

The application of the doctrine under such circumstances as these was enforced in the case of *Thellusson v. Woodford*.^b There a testator by his will directed, that in case he should in his lifetime enter into any contract for the purchase of any lands, &c., and should happen to die before the necessary conveyances thereof were executed, such contract should be completed by his trustees after his death, and the purchase monies paid out of his personal estate, and the conveyances be made to them, their heirs and assigns; and that they should stand seised of the premises, subject to such uses as were declared concerning the estates he had directed to be purchased: and the testator bequeathed certain legacies to his heir at law: — on the question whether the heir was entitled, as well to such estates as were conveyed to, and such as were contracted to be purchased by, the testator after making his will, as also to the benefits he acquired thereby, he was held to be within the principle of election, and that therefore he must elect between the estates acquired subsequently to the will, and the benefits which he took under the same.

And the Lord Chancellor observed, that the testator, under the direction as to his future contracts for purchases, conceived his trustees would be legally seised according to the uses of his will: — that as he had not the power to make such disposition, the heir took those estates that

^a 29 C. 2. c. 3.

^b 13 Ves. 209. Affirmed on ap-

peal, 1 Dow's P.C. 249. Rendlesham v. Woodford.

could not pass by the will; but that the testator, not being aware of this, gave considerable interests to his heir, but gave those interests under the conception that the whole property and arrangement were subject to his control; and that upon this ground the principle of election must prevail.

Election is also applicable to property in Scotland as well as in England. If therefore a person possessing estates in Scotland and also in England, or in parts subject to the English laws, dispose of the former in favour of some third person, and of the latter in favour of his heir; and provide that certain incumbrances to which the Scotch estates are liable shall be borne by the other estates; and the deed of disposition by reason of its testamentary nature is capable of being reduced by the heir so far as it affects the Scotch estates: if the heir avail himself of his power to set the deed aside, he will not be suffered to take the estates devised to him, without at least making compensation thereout to the disappointed devisee of the Scotch estates according to the value thereof.^c

So if a testator, by a duly attested will, devises freehold estates in England and Scotland in such manner as that the heir at law is entitled to take a partial interest therein; and the will not being competent to pass the lands in Scotland, which are not devisable, but capable of conveyance by deed only, they in consequence descend upon the heir; to a case so circumstanced the doctrine of election is applicable.

Therefore where a testator devised and bequeathed all his freehold, copyhold, and leasehold estates situate in England and Scotland, and all his personal estate, to trustees, upon trust to be sold at the expiration of three years from his decease; and directed the produce to be divided equally between his nephews and nieces, one of

^c See Gainer v. Cunningham, stated in 1 Bligh's P. C. 27. which seems to warrant the principle laid down in the text. And see the Appendix, infra, where a state-

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Cases illus-
trative of
election as
applicable
to property
in Scot-
land.

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which nieces was his heiress by the law of Scotland of all his heritable property in that country, and a feme covert; and the will was not competent to pass such of the testator's real estates as were situate in Scotland, which accordingly descended upon his heiress: on the question whether the heiress should be permitted to take the heritable property, and also a share in the testator's other real and personal estates as one of his nieces, it was held she should elect between them: and the Master of the Rolls in the course of his judgment said, that as to the law of England, a will of land in Scotland must be held analogous to that of copyhold estate in England, and was equally to be read against the heir:—that it was said, a will of copyhold estate might have some effect in that court upon the copyhold, that was, if there was a previous surrender; but that then the estate did not pass by the will, which operated only as a declaration of the use; in which respect there was no difference between a copyhold and land in Scotland; for that if in Scotland there was a conveyance previously executed according to the proper feudal forms, the party might by will declare the use and trust to which it should enure.^d

Marital
rights of
husband
not affected
by wife's
election.

Where both
subjects of
election
have con-
sisted of
personal
estate.

Principle
stated.

If a legatee
by insisting
upon a de-
mand con-

And in this case it was held, that the marital rights of the husband, who took no benefit under the will, could not be affected by the wife's election.

3. Where both subjects of election have consisted of personal estate.

The doctrine of election applies in the case of personal legacies.—If a specific thing belonging to one of the legatees is by the will given to another person, the legatee cannot hold both; he must make himself competent to take the legacy by giving up that specific thing.^e

The foregoing inquiry is exemplified by a case where a husband bequeathed the use of jewels to his wife during widowhood, then over, and also pecuniary legacies and

^a Brodie v. Barry, 2 Ves. & Bea. ^b See 2 Ves. jun. 697. in Wilson 127.; and see Ker v. Wauchope, v. Lord John Townshend.
^c Bligh's P. C. 1., and Appendix, infra.

personal chattels; and she afterwards claimed the jewels under a settlement which entitled her to them absolutely: it was held that if she insisted on her claim, she must relinquish her legacies under the will.^f

Where a particular thing is bequeathed in discharge of a demand, the party insisting on his demand will be decreed to waive not only that particular thing, but all benefit which he claimed under the whole will.

For where a father, upon his daughter's marriage, gave a bond to leave 5,000*l.* amongst her younger children, and by will created a term in trustees out of his real estates, in trust to apply the rents for the maintenance of his daughter's children till of age, and gave his personal estate in trust that the produce thereof might be paid to his wife for life, and after her death that 1,500*l.* might be paid to A., one of the daughters of his daughter, and 3,500*l.* among her other younger children as she should appoint, if no appointment then equally between them; and declared that the legacies should be in full satisfaction of the bond: upon a bill brought by one of the daughters to have her share as well out of the trust of the term as of the 5,000*l.*, it was decreed she might elect to claim either under the will or bond, but that if she claimed under the latter, she must take no benefit under the former.^g

And though a person dispose of the property of another under the mistaken impression of its belonging to himself, yet if he gives the true owner some other benefit, it will be incumbent on him to give up his own property if he takes what is given to him.

Therefore where a daughter was entitled, as well in her own right as the administratrix of a deceased sister, to a share in the sum of 5,000*l.*, which by virtue of the articles made on her father's marriage was agreed to be laid out in land; and he by his will gave her 6,000*l.*: the Lord Chancellor held that she could not be allowed to claim under

^f Billing v. Dacres, cited in East v. Cook, 2 Ves. sen. 31. This case is in strictness one of satisfaction; as to which see *infra*, Chap. VI.

^g Graves v. Boyle, 1 Atk. 509.

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tion to wills.*

travenes a
will, he can
claim
nothing
under it.

A case of
election
may be
raised,
though the
property of
the person
put to elec-
tion be dis-
posed of by
mistake.

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 considered
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 tion to wills.*

the articles and will both, but must make her election which she would abide by; for that it appeared expressly by the testator's will, that he had considered the 5,000*l.* as part of his personal estate; in which indeed he had been mistaken, but that such mistake could make no difference: — that it was sufficient to say, the testator considered the 5,000*l.* as part of his personal estate, out of which the daughter was to have satisfaction for her legacy of 6,000*l.*; and therefore she could not claim the 6,000*l.* and her interest in the 5,000*l.* likewise.^h

A case of
 election
 may be
 raised in
 conse-
 quence of
 the infor-
 mal execu-
 tion of a
 power.

If a person, having a power to appoint by his will a money fund amongst a class of persons, to which they are entitled in default of any appointment being made, executes an appointment not warranted by the power, which is consequently void, but bequeaths legacies to the persons entitled to share the fund; they cannot take both their shares in the fund in opposition to the defective appointment, and also their legacies, but must elect between them.

Therefore where a testator, having power to appoint by his will a sum of 3,000*l.* among his children, which in default of appointment was to be equally shared between them, and having five children and several grand-children, appointed the sum wholly amongst the grand-children, which appointment was consequently void, but by the same will gave a legacy to each of his children; — on the question whether the children must elect between the 3,000*l.* and the legacies bequeathed to them by the will, they were decreed to do so, though it was objected that the moment the will was executed, the instrument creating the power gave the title, and therefore the children by claiming both interests did not defeat the will, which was a mere nomination of parties.ⁱ

And here may be added the principles deducible from a very recent case^j, and which seem fully to warrant this

^h Walpole v. Lord Conway, 1 Whistler v. Webster, 2 Ves. Barnard. 153. See also the same jun. 567. Sug. Pow. 384.; and see principle recognized in Llewellyn Wollen v. Tanner, 5 Ves. 218. v. Mackworth, Barnard. 450. ⁱ Hume v. Rundell, 2 Sim. & Stu. 174.

proposition : — that if a testator appoints a sum of money among his children in pursuance of a power for that purpose, and directs that the annual produce of their respective shares shall, until the same become vested, be applied for their maintenance and education; and such direction given respecting the annual produce proves not to be sustainable; and the testator gives the person, who would alone be benefited by the withholding of maintenance, some free disposable property: these circumstances present a case of election, and such person will not be permitted to take under the will without confirming it.

If a husband by his will assumes to dispose of a chose in action belonging to his wife, without having previously reduced the same into possession, and bequeaths some benefits to her, she must elect to take either under or against the will.

Thus where a testatrix bequeathed a legacy of 600*l.* to a feme-covert, to be paid within twelve months after the testatrix's decease; and above a year after her death, the legacy not having been then paid, the legatee's husband by his will disposed of the legacy to his wife for life, and after her decease to her children, and also gave her another inconsiderable benefit; and the acts done by the husband touching the 600*l.* were held insufficient to reduce the same into possession; the case was considered as one of election; and it was declared that the legatee was not entitled to any benefit under her husband's will, she having elected to take against it.^k

If a testator makes his will under a mistake, as if, for instance, he proceeds under the impression of having provided by virtue of some prior instrument an absolute specific sum for each of his daughters, and on the faith of that proceeds to distribute the rest of his property; if any daughter insists that he has made that provision, and that another daughter is not entitled to such specific sum under

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A wife may
be put to
election in
conse-
quence of
her chose in
action hav-
ing been
disposed of
by her hus-
band's will.

Case of
election re-
sulting
from a mis-
taken im-
pression in
the author
of it.

^k Blount v. Bestland, 5 Ves. 515.

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tion to wills.

As to the
admissi-
bility of
parol evi-
dence to
make out a
case of
election.

it, she must relinquish what the will gives her, in order to compensate the loss sustained by the other daughter.¹

The next cited case upon the doctrine under discussion is very important, on account of the information afforded by it how far a case of election may be raised through the intervention of parol evidence. The deduction from it seems to warrant the conclusion, that where a testator uses words of general description in his will, as "my personal estate," parol evidence may, under certain circumstances, be admitted to show, that under those words he intended to embrace property not strictly his own.

The case alluded to was this: a feme at the time of her marriage was, among other things, entitled, as residuary legatee of a deceased aunt, to a mortgage for 2,600*l.*, another for 250*l.*, and to several leasehold houses; and after her marriage the husband received the rents of the mortgaged property, accounting for the same to the mortgagors, after deducting the interest, and also granted leases of the leasehold houses, in some instances granting the whole term, in others leaving a reversion; as to some executing actual leases, as to others only agreements for leases: and the husband by his will, after making considerable provision for his wife, directed the residue of his real and personal estate to be converted into money upon certain trusts: and after his death a paper writing was found with his will, containing a statement of his property, wherein he included the mortgages and leaseholds of the wife:—one of the points of the case was, whether by the words, "my personal estate," the testator could be held to have intended to pass the above property of his wife, and so raise a case of election, which depended upon the admissibility of the written paper as evidence: and the Lord Chancellor observed, that after the case of *Pulteney v. Lord Darlington*², and what Lord Chief Justice De Grey, Baron

¹ *Vane v. Lord Dungannon*, cited 3 Ves. 521. in *Hinchcliffe v. Hinchcliffe*, and 6 Ves. 314. in *Pole v. Lord Somers*.
² *Scho. & Lef.* 117. 129.
³ *Reg. Lib. A.* 1773. fo. 710.

Eyre and Lord Alvanley^a had said, he did not think himself at liberty to reject the paper as evidence; and that it was with great satisfaction on receiving it he found, that it was evidence co-temporary with the will, which left as little to hazard as could be in such a sort of case: — that it might be stated as a fact, that the moment the testator made his will, he sat down to state the effect of it.^b

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tion to wills.

In a case much anterior in point of time to that last cited it was held, that for the purpose of raising a case of election by will, the testator's intention must appear from something contained in the will, and could not be shown from evidence *dehors* the will.^c

Therefore where a testator having suffered a recovery of a manor, to a part of which he was in fact only entitled, afterwards by his will devised in general terms all his real and personal estate to trustees: on the question whether the testator's supposition that he was entitled to the whole manor, which was proved by the evidence, was sufficient to put certain legatees under the will to election, it was decided not to be so, the Court observing, that the argument in *Noys v. Mordaunt*^d, and the whole suite of cases upon this subject, had turned upon the expressions of the will.^e

Upon the subject of evidence it may be added, that in *Pulteney v. Lord Darlington*^f, the rent-rolls of General Pulteney were given in evidence to show he treated an estate tail as his own. In *Doe v. Chichester*^g, where most of the cases respecting the admission of parol evidence to enlarge the terms of a will were gone into, it was decided, that, unless in cases where there is a *latent* ambiguity, parol or extrinsic evidence is not admissible to explain a will.

Parol evi-
dence not
admissible
to explain
a will, ex-
cept where
a latent
ambiguity
exists.

^a 3 Ves. 530. in *Hinchcliffe v. Hinchcliffe*.

^b Supra, page 200.

^c *Druce v. Denison*, 6 Ves. 385.

^d *Stratton v. Best*, 1 Ves. jun.

^e See further as to evidence, *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516.; *Eden v. Smith*, 5 Ves. 341.

^g See accord. 6 Ves. 314. in *Pole v. Lord Somers*. But see *Lord Eldon's observations*, *ibid.* 322.

^f But see *Car v. Ellison*, 3 Atk. 73.

^h 4 Dow's P. C. 65.

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Cases wherein the doctrine has been held inapplicable, and those forming exceptions to the doctrine.

If a testator by his will devises real estate to another in exercise of a power given to him for that purpose, and the execution of the power proves invalid by reason of the testator's infancy, and the testator bequeaths a legacy to the person upon whom the estate descends in consequence of the execution of such power not being sustainable; the legatee will not be obliged to elect between the estate so descended to him and the legacy, but will be entitled to both.

Case of election prevented being raised by reason of testator's infancy.

This was one of the points decided by the case of *Hearle v. Greenbank*^a: there a testator devised his real estate to trustees, in trust for the separate use of his daughter A., a feme covert, for life, remainder in trust for such purposes as she by deed or writing executed in the presence of three or more witnesses should appoint. A. being under twenty-one, but above seventeen, by her will, assuming to execute her power, gave to her daughter B., an infant, 8,000*l.*, to be paid at twenty-one, but if she died before that age, without leaving issue, then over, and gave the residue of her real and personal estate to the plaintiffs absolutely: and it was insisted, that if the execution of the power was void, (as it was determined to be,) by reason of A.'s infancy, in which case the real estate would descend upon B. the legatee of the 8,000*l.* as heiress at law, yet that B. should not take both the estate and the legacy, but must elect between the two interests; and that though the will could not be read as a will, yet it might be read so far as to show the intention of A. that B. should not have both the 8,000*l.* and the real estate: but the Lord Chancellor was of opinion, that the infant B. was not compellable to make her election, for that the will being void as to the real estate, there was no instance where an infant had in such case been compelled to make an election; and that there was properly no will at all as to lands.

^a 3 Atk. 695. 1 Ves. sen. 298.

It was of course competent to the testatrix in the last-mentioned case to have annexed an express condition to the legacy, and thereby created a case of election, had she so thought fit.

A further deduction afforded by this case is, that if a testator disposes of the estate of another by a will not sufficient to pass land, and bequeaths a legacy to the owner of that estate, without expressing that the same is given upon the condition of his acquiescence in the dispositions of the will; the Court will not raise such condition by implication.

These propositions therefore follow;—that if a pecuniary legacy is bequeathed by an unattested will, under an express condition to give up a real estate by that unattested will attempted to be disposed of, this constitutes a case of election, since the legatee cannot take the legacy without complying with the express condition^x: but that if there be nothing in such will save a mere devise of real estate, the will is not capable of being read as to that part; and unless according to an express condition the legacy be given, so that the testator said expressly the legatee should not take unless that condition was complied with, this is not a case of election.

And where a testator devised all his freehold and copyhold estates, in default of issue male, to his two daughters A. and B., and all other daughters he might thereafter have as tenants in common in fee; and afterwards, having had another daughter C., made a second will, whereby he devised all his freehold and copyhold estates between the said A. and B. only, and bequeathed a legacy of 15,000*l.* to his said daughter C., but died without having executed such second will, which however was afterwards proved in the ecclesiastical court as a testamentary paper:—one of the questions being whether C. should be at liberty to

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tion to wills.

Where a
Court will
not raise a
condition
by implica-
tion, so as
to promote
a case of
election.

When an
election
case will be
raised by a
conditional
legacy.

Where not.

No case of
election will
be raised by
an uncondi-
tional le-
gacy.

^x See accord. Boughton v. Boughton, 1 Ves. sen. 12.; and Boughton, *supra*, page 210. ^y *supra*, page 210.

^x See *supra*, page 209, 210.

^y See 8 Ves. 497. in *Sheddon v. Goodrich*.

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 considered
 in applica-
 tion to wills.**

claim the 15,000*l.* under the second will, and at the same time the real estate in opposition to it, or must elect; the Master of the Rolls held she could not be put to her election. And he observed, that the cases which had been cited, (*Hearle v. Greenbank*^a, and *Boughton v. Boughton*^a,) were certainly great authorities; but that he must confess he should have had great difficulty in making the same distinctions, if they had come before him: — that they had said, you shall not look into a will unattested, so as to raise the condition which would be implied from the devise, if it had appeared; but that if you give a legacy on condition that the legatee shall himself give the lands, then he must elect: — that however he was bound by the force of those authorities to take no notice whatever of the unattested will, so far as it related to the freehold estates.^b

This last case was followed by Lord Eldon C. in *Sheddon v. Goodrich*^c, where a testator by his will, attested by three witnesses, directed the sale of his real and personal estate for certain purposes, but the will was held not to have so changed the nature of the real estate as to convert it out and out; and the testator afterwards made a codicil to his will, attested by two witnesses only, and not competent therefore to pass the surplus interest in the real estate, but from which it appeared he meant to dispose both of his real and personal estate among his children: — and these instruments were held not to raise a case of election on the part of the heir.

**A condition
 will not be
 inferred
 from con-
 jecture, so
 as to put
 the heir to
 election.**

And the Court will not infer a condition so as to put the heir to election from conjecture only, nor unless the words be strong enough to raise such condition.

Thus where a testator, by a will attested by two witnesses only, devised to trustees certain property in the East Indies, (which was ascertained to be of the nature of fee simple, and therefore not capable of being devised by

^a Supra, page 226.

n. (4.) [5th ed.]; see also same

^a Supra, page 210.

cases cited 8 Ves. 492.

^b Cary v. Askew, 1 Cox's Ch. Ca. 241.; and see 2 Bro. C. C. 58.

* 8 Ves. 481.

a will so attested,) upon trust to discharge all just demands against him, and to pay a legacy of 100*l.*; and then gave the residue of his property to his mother, and afterwards died, leaving his mother and the plaintiff his heir at law surviving: and the mother by her will, not attested to pass freehold estates, gave to the plaintiff 1,000*l.*, and also took upon her to devise to him the property she took under her son's will: and the plaintiff by a bill against her executors prayed an account of the rents and profits received by his mother during her life, or by the defendants since her decease, and also for the 1,000*l.* legacy: one of the questions being whether he was entitled to the legacy, and also to the estate; the Master of the Rolls, after observing it had been decided in several cases that a will executed by two witnesses only was not sufficient to put the heir to his election, said, that there was not enough expressed in the will to clothe the gift with any condition, and that he therefore felt himself unable to decide against the plaintiff.^d

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considered
in applica-
tion to wills.*

From the foregoing cases then it appears evident, that if a man executes a will in the presence of two witnesses only, and devises his real estate from his heir at law, and the personal estate to his heir at law, and the will is good as to the personal estate, but void as to the real; the devisee of the real estate cannot compel the heir at law to make good the devise thereof before entitling himself to the personal legacy, there being no will of real estate for want of the ceremonies required by the statute of frauds^e, and there being no words of condition in the will to put the heir to his election.^f

Deduction
from cases..

A distinction must however be observed between cases of election, and those depending upon the performance of conditions precedent; which, though they at first sight bear a strong resemblance to the former, yet on examination will be found not to involve the doctrine of election.

Distinction
between
cases of
election,
and those
depending
upon per-
formance of
conditions
precedent.

^d *Gardiner v. Fell*, 1 Jac. & Walk. ^f Per Lord Hardwicke in *Hearle v. Greenbank*, 5 Atk. 715.

22. * 29 C. 2. c. 5.

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tion to wills.*

To the latter class belongs the case of *Roundel v. Currier.*^a There A., being seised in fee of certain estates, and tenant for life of other estates, with remainder, after certain intermediate limitations which failed taking effect, to B. in tail, and being desirous that all the estates should go together, devised them to trustees, to be by them conveyed to other trustees, to the use of B. for life, remainder to his first and other sons in tail, remainders over; and expressed the devise to be upon condition that B. should within six months suffer a recovery of and bar the remainders in the estates whereof he was tenant in tail; and convey them to such uses as were declared by the testator of his own estates, and of which no conveyance was to be made before B. had suffered the recovery; and in default of his doing so, to convey the latter estates over to others. Upon the testator's death, B. did various acts indicative of an election to acquiesce in the dispositions contained in A.'s will, and made preparations for suffering the recovery, but died before the same was completed: and the Master of the Rolls thought it not accurate to call the case one of election: — that the material question was, whether B. had done all the acts he must do in order to entitle himself to A.'s estates: — that he would not say it was absolutely necessary a recovery should be suffered, but that B. ought to have obtained such an interest in his own estates as he could convey, which had not been done.

*Cases form-
ing excep-
tions to the
doctrine.*

Though the rule of not claiming by one part of a will in contradiction to another be a true one, yet it has its exceptions; for several cases have been, and several more may be, in which a man by his will shall give a child, or other person, a legacy or portion in lieu and satisfaction of *particular things expressed*, which shall not exclude him from another benefit, though it may happen to be contrary to the will; for the Court will not construe it as meant in lieu of every thing else, when he has said a particular thing.^b

^a 2 Bro. C. C. 67.; and see Taylor v. Popham, 1 Bro. C. C. 167.; ^b Per Lord Hardwicke in East Simpson v. Vickers, 14 Ves. 341.

And where it may be collected from the whole tenor of the will that the testator did not intend to exclude the devisee, claiming a right contrary to the letter of the will, from any other benefit under it, he will not be put to his election.

As where a testator purposed to carry into execution his father-in-law's will, but mistaking it did not; and gave the plaintiff 500*l.* only, where the father-in-law intended he should have 1,000*l.*: the plaintiff was decreed the 1,000*l.*, and not excluded from any other legacy given him by the will.ⁱ

So if a testator expresses what shall be the consequence of a devisee's disputing a particular part of the will, and what loss shall be sustained; he shall sustain that loss and no other, and may take another gift under the same will.

As where a testator, being seised for life of one estate, with remainder to his first and other sons in tail, and in fee of another estate, and having four sons, A. B. C. and D., devised the fee-estate to B., and the life-estate to C. and D.; and noticed, that if he had no power to devise the life-estate in the manner he had done, then the share of 2,000*l.* mentioned in his marriage settlement, and by his will left to B., must go to C. and D.: in this case, the testator himself having annexed the condition, there was no occasion for the law to imply any other.^j

And if a man devises lands or money to his wife in lieu of dower, she shall not have both, but may take any other benefit given her by the will.^k

Another exception is, where a devisee does not disturb the devise in *toto*, but only claims an excrecent interest out of the estate for a time, and then suffers it to go ac-

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considered
in applica-
tion to wills.*

A case of
election
will not be
raised if
against the
apparent
intention.

Nor if the
conse-
quences of
disputing
will be
pointed out.

Nor where
devisee
does not
disturb will
in *toto*.

ⁱ East v. Cook, *ibid.* 30. And see Vern. & Scriv. 55. in Stewart v. Henry.

^j Bor v. Bor, 3 Bro. P. C. [ed. Toml.] 165.; and see Vern. & Scriv. 54. And Lord Eldon C. has said, that where a testator expressly states what shall be the conse-

quence of not complying with the condition imposed by the will, the Court cannot enforce the condition by enlarging the forfeiture. See 14 Ves. 382, 383. in Garrick v. Lord Camden; and see Tucker v. Sanger, 1 M'Clel. 424.

^k See Vern. & Scriv. supra.

Chap. II. *Election considered in application to wills.* cording to the disposition made thereof by the will. As where a widow claimed dower out of the very estate of which a remainder was limited to her, she was allowed to do it.¹

Contra-dictory claim by legatees does not necessarily create an election case.

Though the claim by a legatee to two or more benefits under a will may be contradictory to some part thereof, yet it does not necessarily follow that such claim will raise a case of election.

Therefore where a testator bequeathed to his wife all jewels, plate, and furniture, and devised all his real and chattel estate, subject to two annuities to his wife, in trust to be sold, and his debts paid thereout; and bequeathed all the residue of his estate to his children, and declared his intent to be that his personal estate so given to his children should be exempt from payment of debts; and the real and chattel estate not being sufficient to pay all the debts and the two annuities, the wife insisted that the personal estate should be liable to make up the annuities: the Court held, that although it was plainly intended the personal estate should be exempt, yet that her claim thereupon was not such a contradiction of the will as should defeat her of her legacies: — that the intention was, she should have the annuities, as well as that the personal estate should be exempt; and that she might insist on the subjection of the personal estate to debts without such a contradicting of the will.²

Where infant will not be put to election by conduct of trustee.

If a person be entitled to an estate not well devised from him by will, and by the same will has a legacy bequeathed to him, which, he being a minor, a power is given to a trustee to receive for him, and it is accordingly paid to the trustee, by whose failure it is afterwards lost, and the legatee receives no satisfaction for it; Lord Hardwicke said, he would never carry the rule in *Noys v. Mordaunt*³ to the extent as to put the legatee to make his election,

¹ *Inclendon v. Northcote*, 3 Atk. 450. 456.; and see Vern. & Scriv. 55. and infra. ² *Huggins v. Alexander*, cited 2 Ves. sen. 31. in *East v. Cook*.

³ *Supra*, page 200.

merely because the trustee received the legacy for him during his minority.^o

Neither will a person be compelled to make an election, unless the intention of the party creating the election be sufficiently made out; for there never can be a case of election but upon a presumed intention of the testator.^p

So that where a testator bequeathed an annuity of 50*l.* to his housekeeper for life; and reciting that he was indebted to her in 500*l.*, directed the same to be paid out of his real and personal estate; but it appeared that a larger sum was due to her, and that the testator had miscalculated the amount: on the question whether the legatee must elect between the legacy and debt, she was held not bound to do so, the Master of the Rolls observing, that the intent of the testator was, not to make a composition of a debt he owed her, nor to give part in lieu of the whole of it, but to pay her the whole debt besides the 50*l.* annuity. And he distinguished the case from that of *Jenkins v. Jenkins*^q, by stating, that in the latter the Court went on the circumstance that the testator, knowing what he owed, made a composition with his son.^r

And where a husband upon his marriage executed a bond to trustees, conditioned for the payment of 2,000*l.* within three months after his decease, in trust to place the same out at interest for the benefit of the children of the marriage, if any, and if there were no children, or none living at his death, in trust, as to the principal sum, for the sole benefit of the wife; and by his will gave all his real and personal estate to trustees, in trust to pay the annual rents and profits thereof to his wife for life; and there was no issue of the marriage: on the question whether she should be put to an election between the sum secured by bond and her life estate, it was decreed she should take both.^s

^o See 2 Ves. sen. 603. in *Moore v. Moore*.

^p See *Baugh v. Read*, 3 Bro. C. C. 191.; 1 Ves. jun. 257.; ibid. 557. in *Crosbie v. Murray*.

^q Supra, page 208.

^r *Clarke v. Guise*, 2 Ves. sen.

617.

^s *Forsyth v. Grant*, 3 Bro. C. C. 242.

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considered
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tion to wills.

Case of
election can
only be
upon tes-
tator's pre-
sumed in-
tention.

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 tion to wills.**

To consti-
 tute a case
 of election,
 testator's
 intention
 must be
 clear.

Case of
 election
 not raised
 by an un-
 founded
 recital.

Necessity
 of clear in-
 tention to
 raise a case
 of election.

Also to constitute a case of election, the testator's intention must be clear, and not left to result from loose words or expressions made use of by him.

Therefore where a testator devised all his freehold and copyhold estates situate in A. B. C. and D., (which copyholds he had surrendered to the use of his will,) to trustees, in trust for his wife for life, remainders over; and at the time of his death was seised of a copyhold estate at A., and a moiety of an estate at B., his wife being entitled to the other moiety, who was also seised of two copyhold estates in C. and D., where the testator had no property, but the testator did not surrender any of his wife's copyholds: this case was held not sufficiently strong to put the wife to an election either to abide entirely by the will, or take nothing under it.¹

And it seems, that a mere recital, without more, of property belonging to a certain individual named, which is not founded upon fact, will not amount to a gift, nor demonstration of an intention to give, nor give rise to a case of election: — but the circumstance of a condition being expressed with reference to one individual, and not to another, is said not to constitute sufficient proof of there being no intention to raise a case of election.²

The necessity there is that a clear manifest declaration of intention should be indicated on the part of a testator, in order to raise a case of election, was strongly exemplified in the recent case of *Rancliffe v. Parkyns*.³

There A., being seised of the manor and estate of B., on his second marriage conveyed the estate, without mentioning the manor, to the use of himself for life, remainder, as to part, to trustees for 99 years, remainder to trustees for 500 years, remainder, as to the whole, to the first and other sons of the marriage in tail male, remainders over, reversion to himself in fee. There was issue of the marriage, of which C., the plaintiff's father, was the eldest son. A.

¹ Read v. Crop, 1 Bro. C.C. 492. ² 6 Dow's P.C. 149.

³ See 18 Ves. 39. 41. in *Dashwood v. Peyton*.

afterwards made his will, whereby he devised his manors lands and hereditaments in B. &c. to trustees for 99 years, remainder to said C. for life, with power of jointuring, remainder to trustees to preserve, remainder to his first and other sons in tail, remainders over. The trusts of the 99 years' term the testator declared to be, for laying out the rents, first, in the maintenance and education of his sons during minority, and then in the purchase of lands. He then directed, that such of his tenants at B. &c. as brought him boon-coals should pay so much a load in lieu thereof, and gave other directions, whence it might be implied he meant to devise a present interest in the B. estate, and to raise a case of election between the settlement and will; but he expressly ratified the settlement, and every thing therein contained. Upon the case being brought before the House of Lords on an appeal from the decree of the Lord Chancellor, who had decided that no case of election was raised, his Lordship, in the course of delivering the judgment of the House confirming his decree, said; — that the utmost construction that could be given to the will, *prima facie*, was, that the testator meant to dispose of such estates at B. as were his own, which were only the manor and reversion; and that it was not to be supposed a testator meant to dispose of that which was not his own: — that the question came to this, whether it was just reasoning to say, that there was that clear manifest declaration of intention which raised a case of election: — that it was unquestionable that if, by the words describing the premises, the testator intended to devise a present interest in the premises in which C. had an estate tail, that amounted to a case of election: — that his opinion however was, that when a testator expressly confirmed a settlement, and every thing therein contained, you cannot, as against that express declaration, take it by conjecture, call it demonstration plain, or necessary implication, or what you will, but still only conjecture, that he did not mean to confirm: — that it was difficult in any case to apply the doctrine of election where the testator had some present interest

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in the estate disposed of, though it might not be entirely his own: — that in the case before the House, the testator had a present interest; he had a manor, in which, for any thing that appeared, he had the entire fee; and he had expressly confirmed the settlement in all its parts.

It is observable, that the strong point of difference between the case last cited and that of *Blake v. Bunbury*^{*} seems to consist in the circumstance, that in the latter the testator confirmed the settlement so far only as related to the younger children; while in the former, as we have seen, he confirmed it in all respects.

We have already seen ^x, that if a testator having power to appoint a fund makes an invalid appointment thereof, but gives some benefits to the persons entitled to the fund in default of appointment, a case of election will be raised.

Where a
 case of elec-
 tion will
 not be
 raised by
 an informal
 appoint-
 ment.

But where A., having power to appoint an estate among his children by deed or will, executed in the presence of two witnesses, devised the same, (after subjecting it with other property to two annuities, and the payment of his debts,) and all other real estates to the use of his son B. for life, remainder to trustees to preserve, remainder to the sons of the body of the said B. in tail general, remainder to the daughters in tail general, remainder, as to part, to the use of the plaintiff, one of his daughters, in fee; and bequeathed the residue of his personalty to the said B., who after his father's death suffered a recovery of the estate, and subsequently devised the same, subject to the annuities, to the defendant in fee, and died unmarried: it having been decided that the plaintiff took no estate under the will of the said A., a question arose whether B. having taken both real and personal estate under his father's will, and also the above estate for want of a due execution of the power, satisfaction ought to be made to the plaintiff out of the personal estate for the disappointment she experienced in not having the estate devised to her: and the Lord Chancellor said, he did not think it within the rule,

^{*} Supra, page 214.; and see * See supra, page 222.
⁶ Dow's P.C. 187.

because he took this to be an appointment that was disappointed :—that it was a good appointment with respect to the annuities, and being an appointment to one purpose, he could not construe it a disappointed devise as to another :—that it was not the case where one person devising to A. and B., and B. defeating the devise to A. was obliged to make satisfaction.¹

The doctrine of election can never be applied but where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate for what is taken away ; therefore in all cases there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away.²

This is shown by a case where a father had the power of appointing trust funds among his children, and in executing his power by will made such an appointment as the power did not warrant ; and one of the questions was, whether those taking under the appointment could not be precluded from disputing any part of it by an application of the doctrine of election ; but the same was held not to apply, inasmuch as no part of the testator's property was comprised in the will but that which he had power to distribute.³

It may be proper to notice, that if a case of election is attempted to be raised upon the will of a feme-covert, disposing either of her separate property, or of that which is not separate, such will it seems cannot be read, unless first proved in the ecclesiastical court, and in the latter case with the assent of the husband.

For where a feme-covert, being entitled to a sum of 500*l.* bank annuities to her separate use, bequeathed 400*l.* part thereof to the plaintiff, together with a diamond ring, and the residue to her husband ; and supposing herself to have a disposing power over another sum of 500*l.* which had

¹ Robinson v. Hardcastle, 3 Bro. C.C. 22. 344.

² See 2 Ves. jun. 350. in Bristow v. Warde. Bristow v. Warde, ibid. 336.

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tion to wills

A free fund
necessary
to the ex-
istence of
an election
case.

Will of
feme-
covert,
upon which
a case of
election is
attempted
to be raised,
when neces-
sary to be
proved.

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 tion to wills.*

been bequeathed to her, but not to her separate use, she by codicil gave 50*l.* part thereof to a brother, 250*l.* other part to her husband, and the remaining 200*l.* to the plaintiff, who brought a bill against the husband praying a transfer of the 400*l.* annuities, and payment of the legacy of 200*l.* and delivery of the ring; and an administration for the purposes of the suit had been granted of the wife's will: — on a question being made for the plaintiff, whether, as the husband had become entitled to 100*l.* part of the sum of 500*l.* annuities, he could take that unless he would give up the ring, or make compensation out of the 100*l.*; the Lord Chancellor, after observing that he could not decide a question upon the will of a married woman as to separate property unless that will was proved in the commons, nor as to property not separate without the assent of her husband, said, that the letters of administration gave no power to make an order as to any thing that was not proved as separate property, and that the will as to such separate property had not been by due authority adjudged to be that species of instrument which he could read as such.^b

The rejec-
 tion by a
 legatee of
 one of sev-
 eral bene-
 fits will not
 raise a case
 of election.

Where doc-
 trine will
 be enforced
 upon a le-
 gatee.

What acts
 do and do
 not con-
 stitute an
 election.

If a person by will gives two benefits to another, one of which he accepts, but the other, being clogged with some burthen, he thinks proper to reject; no election arises upon such a case as this, though an attempt has been made to reduce it within the scope of that doctrine, but to which it was said to bear no analogy, since no other legatee would be disappointed by the claim of one benefit, and the rejection of the other; and that the doctrine of election took place where one legatee under a will insisted upon something by which he would deprive another legatee under the same will of the benefit to which he would be entitled if the first legatee permitted the whole will to operate.^c

V. As to the commission of what acts do and do not constitute an exercise of election.

^b Rich v. Cockell, 9 Ves. 369.

^c See 9 Ves. 533, 534. in Andrew v. Trinity Hall, Cambridge.

No general rules can be laid down in regard to the inquiry, what acts do and do not amount to such an exercise of election, as will be conclusive upon the party electing. The acts by which an election may be either declared or implied are so numerous and of so indefinite a nature, as not to be reducible to any precise rules: each case, wherein the question may present itself for consideration, must depend upon its own particular circumstances.

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tion to wills.

In all cases of election the Court is anxious, while it enforces the rule of equity that the party shall not avail himself of both his claims, still to secure to him the option of either; not to hold him concluded by equivocal acts, performed perhaps in ignorance of the value of the funds: so that before a party is put to election, the funds must be cleared, and he must know what he is about, and have the subject fairly stated to him; because the principle does not go the length of forfeiture, but only that he must be apprised that he cannot take both funds, and be required to elect which he will have, *utrum horum.*^d

A party
will not be
concluded
by equi-
vocal acts.

And though a party must be taken to have elected, still if a new right arises not adverted to at the time, as no one is ever compelled to elect till the whole subject matter has been ascertained, and he knows all his rights on each side, the Court would, according to its habit, indulge him with further opportunity to be informed of his interests.^e

No election
compelled
until whole
subject
matter is
ascertained.

In the attainment of information as to what acts constitute an election, considerable assistance will be found afforded by a perusal of the several cases referred to in the margin^f; in the first of which the right to elect under a will was held to last until the whole of the testator's affairs had been wound up, and the trusts executed, which might

Right to
elect will
last until
testator's
affairs are
wound up.

^d See 1 Swanst. 381. in Dillon v. Parker, 1 Wils. 282, 283. in same.

Montagu v. Lord Beaulieu; Earl of Northumberland v. Marquis of Granby, Ambl. 540., 1 Eden's Rep. 489.; Duke of Northumberland v.

^e See 1 Swanst. 421, 422. in Dillon v. Parker.

Lord Egremont, Ambl. 658.; Cookes v. Hellier, 1 Ves. sen. 234.; Dillon v. Parker, 1 Swanst. 359.

^f Beaulieu v. Lord Cardigan, Ambl. 533., and 3 Bro. P. C. [ed. Toml.] 277. under title of Duke of

CHAP. II. occupy a period of fifty years. The case alluded to has however been frequently disapproved of; and Lord Chancellor Eldon, when Solicitor General, observed, that he had heard Lord Thurlow say over and over again, the case should never bias any other where there was the least difference between them.⁸

Election considered in application to wills.
Where the consequences of an election made will not be enforced.

The intervention of a considerable lapse of time between an election being made, and the institution of a suit to enforce the consequences of such election, will it seems present an obstacle to the Court's interference.

For where a testatrix gave the residue of her personal estate to her nephew A., and conceiving she had power to dispose of some copyhold estates, (but of which she was only tenant for life, with remainder to the said A. in fee,) appointed the same to the said A. for life, remainder to his first and other sons in tail male, remainder to B. for life, remainder to C. for life, remainder over; and A. on the testatrix's decease proved the will as her executor, and was admitted to the copyhold estates, and having surrendered to the use of his will afterwards devised the same to said B. in fee, and died without issue, whereupon B. was admitted, who devised the copyholds in trust for his son; and on B.'s death C. claimed the possession: — on bringing her bill to have the copyholds surrendered, and for an account of the rents, it was insisted in support of her claim, that as to A. the case was one of election, and that by proving the testatrix's will, and his admission, he had elected to take under it: but the bill was dismissed, the Court observing, that the testatrix conceived she had a power to dispose of the copyholds, and meant to give what she had a right to give, not to give what she had not: — that there being no direct proof she meant to dispose of the copyholds if she had no power to dispose of them, it was not matter of election; and that length of time was a great objection to relief, A. having been admitted and surrendered thirty years before the bill filed; and that the

⁸ See 1 Ves. jun. 336. in *Wake v. Wake*.

quantum of the residue was uncertain, and could not appear to the Court at that time.^b

The judgment in the above case, so far as it assumed to decide that a person cannot be put to election where the devise to him is made under an erroneous supposition of title, has been overruled by subsequent cases; and the judgment can't seem to be sustained upon the ground only of the length of time that had elapsed between the testatrix's death and the commencement of the suit; for the Master of the Rolls in commenting upon the case observedⁱ, that if the same was founded upon the argument first urged, it was erroneous; but that he was willing to believe the Lord Chancellor went upon the latter ground, namely, the length of time, for that it was impossible to tell of what the personal estate consisted; and no person could be put to election without a clear knowledge of both funds.^j

The right to compel an election may be precluded by reason of the laches of the party possessing that right.

As where a suit was instituted for the purpose of fixing an act of election, which had been the subject of dispute in a suit brought twenty-eight years before, and which had been put an end to by the plaintiff in the second suit eighteen years preceding the commencement thereof; and the very right asserted by the plaintiff in the second suit had been asserted in the bill on the former occasion; and the defendant in the first suit having died in the intermediate time between its commencement and the second, the latter was brought against his representatives; the second bill was dismissed with costs.^k

A person having an election to exercise may be directed to make it within a certain definite period prescribed by the Court, and in default of his so doing, to be considered

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tion to wills.

No person
can be put
to election
without a.
knowledge
of both.
funds.

The right
of a person
to compel
an election
may be pre-
cluded by
his laches.

Court may
prescribe a
period for
an election
being made,

^b Cull v. Showell, Amb. 727.;
^g Woodes. Appen. 1. This case seems to have been considered a subsisting authority by Lord Redesdale C. See accord. 2 Scho. & Lef. 267. in Moore v. Butler.

ⁱ See 2 Ves. jun. 371. in Whistler v. Webster.

^j See accord. Wake v. Wake, 1 Ves. jun. 335.; infra, page 267.

^k Yates v. Moseley, 5 Ves. 480.

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 tion to wills.*

and provide
 for any
 default.

Whether
 certain acts
 done
 amount to
 an election
 will be
 sometimes
 determined
 by a jury.
 Where the
 represen-
 tatives of a
 person will
 not be suf-
 fered to
 elect.

Where they
 may elect.

An election
 may be
 fixed by
 acceptance
 of interest.

as having elected to take in opposition to the instrument originating the election.¹

It seems that if any doubt presents itself to the mind of the Court, whether or not certain acts done amount to an exercise of election, the question will be sent to a jury to determine the fact.²

And it may be collected, that if such a disposition of property be made by any instrument as to give rise to a case of election, and the person having a right to elect suffers the property to go in the mode prescribed by that instrument; the representatives of such person will not be suffered to exercise an election, even though the conduct pursued by the person whom they represent would not have amounted to a conclusive election; on the principle of not disturbing things long acquiesced in by families, upon the footing of rights, which those, in whose place such representatives stand, never called in question.³

But it was observed in a recent case, that the Court had intimated a disposition to hold, that if the representatives of persons bound to elect, and who had accepted benefits under the instrument imposing the obligation of election, but had not explicitly elected, could offer compensation, and place the other party in the same situation as if those benefits had not been accepted, they might renounce them and elect for themselves.⁴

Where a feme-covert, having had an election to exercise between certain copyhold estates that had not been surrendered to the use of the will disposing of the same, and certain benefits under the same will, consisting of 5,000*l.* bequeathed to trustees, in trust to pay the interest to her for her separate use, and the principal after her decease as she should appoint, received the interest of the 5,000*l.* to her death, she was held to have made an election; and

¹ See accord. the decree in Streatchfield v. Streatchfield, 1 Swanst. 447.

² See 2 Bro. C.C. 73, in Roundel v. Curre

³ See 2 Ves. sen. 525. in Archer v. Pope; and 593. in Tomkyns v. Ladbrooke.

⁴ See 1 Swanst. 385. in Dillon v. Parker; 1 Wils. 285. in same.

her infant heir, who had been admitted to the copyhold estates as customary heir, was likewise held bound by such election.^p

In *Lady Cavan v. Pulteney*^q, proposals laid before a Master, under an order of Court, by a party having a right of election, were held to amount to an exercise of such right.

And where a husband conveyed a house, furniture, and paintings, &c. to his wife, and afterwards by his will bequeathed the same to her for life, together with other property, with remainder to her issue, which circumstances were clearly held to constitute a case of election; it was held, that though the wife's getting possession did not alone amount to an election without full knowledge of her rights, yet that her having defended an ejectment brought by the heir at law for the recovery of her husband's real estate,—having had no other title than that of devisee,—and having continued in possession for more than a year,—and having moreover declared her intention to abide by her husband's will;—these circumstances were held sufficient to show that the wife had made an election to abide by the will, with full knowledge of her rights.^r

Where the question to be determined was, whether two daughters had elected to be tenants for life under their father's will, or tenants in fee under that of their brother; and it appeared that they had executed certain mortgage deeds, wherein they described themselves as daughters and devisees for life under their father's will, and reserved the equity of redemption to them or the persons entitled under their father's will; and were made parties to a deed conveying certain property with which they had no concern, except as devisees for life under the father's will; and also executed certain other deeds in which they were recognised as such devisees for life:—these several circumstances were

^p *Ardesoife v. Bennet*, 2 Dick. 463. ^r *Stratford v. Powell*, 1 Ball & Beat. 1. 23, 24.

^q 2 Ves. jun. 555.

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Infant heir
bound by
ancestor's
election.

The laying
of proposals
before a
Master may
constitute
an election.

So defend-
ing an
ejectment,
&c.

Executing
mortgage
deeds, &c.

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tion to wills.*

writing executed in the presence of two or more witnesses appoint, and in default thereof, to the use of the right heirs of the survivor; and the husband having survived his wife by his will devised a life estate in the copyhold to B., and bequeathed certain benefits to A. his heir at law, but the will was not attested by two witnesses; and on the testator's death A. was admitted to the copyhold, and having surrendered the same to the use of his will devised it among other estates, subject to a trust for payment of debts and legacies; and B. nearly twenty years after the death of the first testator filed a bill against A.'s trustees, praying a surrender to him of the copyhold estate, and an account; and the case was not disputed to be one of election, but it was insisted for the defendants that the account ought to be only from the filing of the bill: the Court decided that the same should not be carried farther back.^u

^u *Pettiward v. Prescot*, 7 Ves. 541. See also *Edwards v. Morgan*, *supra*.

CHAP. III.

THE DOCTRINE OF ELECTION CONSIDERED IN APPLICATION
TO DOWER.

It has been asserted in a previous page^a, that by the common law, a right or title to a freehold could not be barred by the acceptance of any collateral satisfaction; whence it follows, that independently of the statute of jointures^b, no collateral satisfaction can at law be pleaded in bar of a suit for the recovery of dower. But in equity the rule upon this point is widely different, for there the acceptance by matter of contract of any kind of collateral satisfaction, and though not consisting of a strict legal jointure, may constitute a sufficient bar to the claim of dower.^c There are moreover many cases independently of contract, wherein equity will compel a widow to make an election between her dower, and a provision intended to be in substitution for her dower. The subject of the present chapter will consist of an inquiry into the doctrine of election in the above point of view, which inquiry it is proposed to make as follows:

- I. As to the doctrine of election in application to dower.
- II. In what cases a widow will be compelled to elect between her dower and a collateral satisfaction, and not be permitted to enjoy both.
- III. In what cases a widow will not be compelled so to elect, but may enjoy both provisions.
- IV. The commission of what acts by a widow, having such an election to exercise, will be considered as a determination thereof.

^a See *supra*, page 152.
^b 27 H. 8. c. 10.

^c See Co. Lit. 56 b. and note (1.) [17th ed.]; and see *supra*, page 163.

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Doctrine of
election as
to dower.

Where
widow must
elect be-
tween her
dowries and
some col-
lateral sa-
tisfaction.

Intention
to raise a
case of elec-
tion how
attainable.

I. As to the doctrine of election in application to dower.

If a testator makes a provision for his wife by will, and disposes of his freehold estates out of which she is dowable in such a manner as to disclose an intention that she should not take both the provision and her dower, but should have the former in lieu of the latter; a court of equity will compel the wife to elect between the two interests, and not to enjoy both: and a wife is put to her election on the same principle as a stranger.^a

The application of the doctrine of election, in the light we are about to consider it, has undergone great discussion, and great Judges have differed upon it; and it has been said to be more an argument of conscience than any thing else.^b The difficulty appears to have consisted in ascertaining, whether there was an intention on the part of a testator sufficiently manifest to raise the consequence, that benefits communicated to his wife were not compatible with her claim to dower: for it is not necessary that the testator should expressly declare his intention; it is sufficient if it appears from circumstances.^c

The way then of getting at the intention of the testator is, to look into the will, and see whether it is plain, clear, and incontrovertible, that he could not possibly give what he has given consistently with his wife's claim to dower.^d

Some of the more early cases, as we shall presently see, are in direct opposition one to another; but those of recent adjudication are much in unison, and have reduced the doctrine to something more approaching to system than was formerly the case.

One of the earliest cases to be met with, illustrating the interposition of a court of equity in reference to the doctrine of election as connected with dower, appears to be that of *Lacy v. Anderson*.^e There a testator devised certain

^a See 4 Mad. 125. in *Miall v. Brain*.

^b See 2 Ves. jun. 580. in *French v. Davies*.

^c Per Sir Thomas Sewell, in *Jones v. Collier*, Ambl. 732.

^d See 2 Ves. jun. 577, 578. in *French v. Davies*.

^e Choice Ca. in Ch. 163, 164.

See also *Rose v. Reynolds*, ibid. 155.; and see 1 Swanst. 398. 445. in notis.

copyhold lands to his wife in lieu of her thirds at law, which upon his death she accordingly accepted, and enjoyed for twenty years; and then she and her second husband brought their writ to recover dower out of the lands of her former husband; whereupon the Plaintiffs instituted their bill to stay the proceedings, to which bill the Defendants demurred, for that the said copyhold lands could be no bar of dower: and the report states, that the Court thought it no conscience she should have both: and that it was ordered the defendants should answer.

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But the first case in which the doctrine of election in application to dower seems to have been most maturely considered is that of *Lawrence v. Lawrence*.¹ The ground upon which the decision in that case ultimately rested was, that the testator, who had made a provision for his wife by will, had not sufficiently manifested an intention that the same should be in bar of dower. The case of *Ney's v. Mordaunt*,² appears however to have been generally looked upon and referred to as having most clearly founded the doctrine of election, and removed whatever doubts might have previously existed respecting the competency of a testator to propound a case of election as to his wife's dower, though the former case seems by no means to have negatived his ability to do so.³ These cases have been followed by a long train of decisions, from all which the inference to be drawn is, that as the right to dower is itself a clear legal right, an intent to exclude that right by voluntary gift must be demonstrated either by express words, or by clear and manifest implication. If there be any thing ambiguous or doubtful, if the Court cannot say that it was clearly the intention to exclude, then the averment that the gift was made in lieu of dower cannot be

Intention
to exclude
dower must
be clearly
manifested.

¹ See infra, page 257.

² See supra, page 200.

³ From the case of *Charles v. Andrews*, 9 Mod. 151. it seems to have been formerly considered, that a jointure, if not expressed to

be in bar of dower, could never be averred to be so, even in a court of equity; and that nothing but a plain and express intention of the parties should bar the right of dower.

CHAP. III.¹) supported; and to make a case of election, that is necessary; for a gift is to be taken as pure, until a condition appear.¹

II. In what cases a widow will be compelled to elect between her dower and a collateral satisfaction, and not be permitted to enjoy both.

Where a widow must elect between dower and a collateral satisfaction. Whence an intention to put a widow to election is to be collected.

Where a widow takes any benefit under her husband's will, out of whose estates she is entitled to claim dower, an intention on his part that she should not enjoy both the benefit and her dower may be collected either from necessary implication, as where her claim would make a material change in the will itself by disappointing its provisions in a greater or less degree, or from express declaration: the two following cases are of the former character, as indeed are most of the cases hereafter stated, whereupon the question of election has arisen.

As where a testator gave his wife two leasehold houses for life, and an annuity of 10*l.* during her widowhood, charged upon freehold estates, but without any clause of entry and distress; and subject to the annuity devised all his freehold estates to his nephew for life, remainder to the Plaintiff in fee: on a bill instituted against the widow for an account and injunction, she having brought a writ of dower, and that she might either take under the will, or abide by her dower; the Lord Chancellor held it to have been the manifest intention of the testator to give the annuity in satisfaction of dower, he having disposed of all his freehold estates subject to the annuity, so that his widow could have no more out of the estates than the annuity: — that her claim to dower was inconsistent with the will, and that if she insisted upon it, she must, according to the principle in *Noys v. Mordaunt*², give up the devise.³

This case, though directly contrary to that of *Pitts v. Snowden*⁴, which had been previously decided, was never-

¹ See 2 Scho. & Lef. 451, in Bir-
mingham v. Kirwan. Brown v 466.; 2 Eden's Rep. 236. See the
Parry, 2 Dick. 685. case somewhat differently stated,
— Supra, page 200. 1 Bro. C. C. 292, in note.

² Arnold v. Kempstead, Ambl.

³ Infra, page 258.

theless followed by Lord Camden in the next mentioned case, where a testator gave an annuity to his wife for life, with clause of entry and distress; and subject thereto, devised all his real estate to trustees, in trust for his daughter for life, and to demise the same for the best rents without taking any fines, remainder in trust for the heirs of her body, remainders over; and the wife, on claiming both the annuity and her dower, was compelled to elect between those two interests, the Court observing, that the claim of dower would disappoint the will, and put the wife in possession instead of the trustees, and that the two interests were inconsistent with each other:—that there was a necessary implication to bar the wife of dower, the disposition of the property being such as to leave no fund for her claim of both; and that it was the same thing whether the testator had said she should be barred, or so disposed of his property as to leave no fund to answer the double claim.^p

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tion to
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In subsequent cases however preference has been given to Lord Hardwicke's decision in *Pitts v. Snowden*, as we shall presently see.^q

In *Arnold v. Kempstead*^r, the annuity was made to issue only out of the freehold estates subject to dower; but in *Villa Real v. Lord Galway*, the annuity was made to issue out of more than the dowable estate: that circumstance therefore does not seem to have been considered as important. But the latter case may perhaps be thought sustainable by reason of its particular circumstances. And Lord Redesdale in allusion to this case observed^s, that his recollection of the manner in which it had always been treated was, that the claim of the annuity was considered as utterly inconsistent with the claim of dower; and that the directions in the will with respect to the management of the whole estate, the payment of the annuity, and the

^p *Villa Real v. Lord Galway*, Amb. 682. 1 Bro. C. C. 292. in note. ^r Supra, page 250. ^s See 2 Scho. & Lef, 453. in Birmingham v. Kirwan.

^q See infra, page 258.

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accumulation during the minority of the child, were inconsistent with the setting out a third part of the estate by metes and bounds: and that therefore Lord Camden thought the implication manifest that the testator did intend the annuity as a provision in bar of dower.

Though a general provision made either by deed or will by a husband for his wife will not be adequate to raising a case of election between that interest and her dower, unless it is expressed to be in bar of dower, or such an intention necessarily results from the instrument; yet where the words of a bond were to secure a sum of money for the wife's livelihood and maintenance, Lord King, Chancellor, was of opinion that this was a bar of dower¹, and within the equity of the statute of jointures.² But this case has in strictness no relation to the present inquiry, since no election was raised thereby.

Inequality
in point of
value be-
tween
dower, and
the subject
of collateral
satisfaction,
will not
preclude a
case of
election.

Cases of election between dower and other benefits have not, it seems, gone upon any calculation of the relative value between the two interests: therefore though the benefits be much inferior in point of value to dower, yet that circumstance will not of itself preclude the existence of a case of election.

As where a testator devised his dwelling house at C. with the household goods and furniture to his wife for life; and charged his freehold estate at C. with an annuity of 40*l.* to her for life; and after charging the said estate with another annuity, devised the same, and also his said dwelling house and furniture after his wife's decease, and all other his real and personal estate, to trustees for the benefit of a grand-niece; and ordered his executors to apply the surplus rents of the estates for her maintenance and education until she attained twenty-five; and directed his trustees to perform a contract for sale of part of his estate: on the question whether the widow should not elect between the provisions under the will and her dower, (the Master having found

¹ Vizard v. Longdale, cited in see supra, page 165., and 10 Ves. Tinney v. Tinney, 3 Atk. 8.; and 20, 21. in Garthshore v. Chalie.

² 27 H. 8. c. 10.

that her dower was about 10*l.* a year more than she was entitled to under the will,) she was decreed to do so, the Court observing, that the testator's directing the surplus rents to be applied differed from the expression of "his estate," which might admit of the claim of dower; and that when he entered into a contract for sale of part of his estate, he considered himself as having power to dispose free from dower, and directed the trustees to complete the contract, and convey to the purchaser.^{*}

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The latter case was determined by Sir Thomas Sewell, of whom it is reported, that he afterwards decided a case in a manner wherein he seemed in some degree to deviate from his former opinion, saying, that unless by express words it appeared the testator intended to bar his wife of dower, she should not be put to her election: and that he held her entitled to dower, and did not go upon the circumstances so much, but upon *Lawrence v. Lawrence*¹, and *Lemon v. Lemon*.² It should moreover be observed, that the principle of the case of *Jones v. Collier*³ was not followed by Lord Thurlow in *Foster v. Cook*⁴, he deciding, that a devise by a testator of all his estate, subject to an annuity thereout to his wife, did not afford any foundation of an intention to exclude her from dower.

And where a testator made certain provisions for his wife by will, adding a clause, that in case she married again, all and every the devise and bequests to her should cease, and in such case he bequeathed to her an annuity of 100*l.* during her life, charged upon his real estates, the same to be in full for every benefit and advantage which he meant should arise out of any of his real or personal estates in case she married again; these words were held to indicate an intention on the part of the testator, that the wife should not have both her dower and the annuity, but must elect between them: and though it was urged that

^{*} *Jones v. Collier*, Ambl. 730.

¹ Infra, page 258.

² *Wride v. Clark*, cited in *French v. Davies*, 2 Ves. jun. 580.

² Supra.

³ See infra, page 257.

³ Infra, page 259.

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tion to
dower.*

Inconsis-
tency of
disposition
with wife's
claim to
dower will
raise a case
of election.

such could not have been the testator's intent by reason of the inequality between the two interests, yet that objection was held to be immaterial.^b

If the disposition made by a testator of his property is directly inconsistent with his wife's claim to dower throughout, having by the words he has used clearly meant the subject of devise, and not what might in contemplation of law be his interest in that property, and she is a party interested, she will be put to her election.

As where a testator gave to his wife and two children all his estates whatsoever, whether real or personal, to be equally divided amongst them, and particularly specified the subject matter of disposition; the question being whether the wife ought to be put to her election as to her right of dower, the Master of the Rolls observed, that whether she took under the will an absolute interest, or for life only, it was a case of election, the claim of dower being entirely inconsistent with the disposition of the will:—that the testator directing all his real and personal estate to be equally divided, the same equality was intended to take place as well in the division of the real as of the personal estate, which could not be if the widow first took out of it her dower, and then a third of the remaining two thirds:—and that the testator, by describing his English estates, excluded the ambiguity which Lord Thurlow in *Foster v. Cook*^c imputed to the words "my estate," as not necessarily extending to the wife's dower.^d

To the foregoing cases falling under the present head of inquiry, may be added the two following ones of recent adjudication, as further exemplifying the doctrine before us.

A testator devised all his real and personal estate to trustees, upon trust, as to certain freehold messuages in P., for his wife during her life, if she so long continued his

^b *Boynton v. Boynton*, 1 Bro. C. C. 445.

^c *Infra*, page 259.

^d *Chalmers v. Storil*, 2 Ves. & Bea. 222.; and see *Roberts v. Smith*, 1 Sim. & Stu. 513. decided upon the same principle.

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widow, and to pay her an annuity of 100*l.* out of the profits and income of his real and personal estate during such her widowhood; and upon further trust to pay his daughter N. an annuity of 100*l.* for life, and permit her to use occupy and enjoy his freehold messuage, &c. at B. for life; and made a residuary disposition in favor of any child his wife might be enceinte with at the time of his decease, and his five daughters, as tenants in common in fee: — on the question whether the testator's widow was entitled to dower, and also to the provision made for her by his will, his Honor the Vice-Chancellor thought the testator had shown a plain intent that the trustees should take an interest in the house provided for his daughter, which would exclude the wife's dower, observing, that the testator directed the trustees to permit his daughter to use occupy and enjoy a certain freehold house for her life: — that he thought the testator contemplated for his daughter the personal use occupation and enjoyment of the house, which was inconsistent with the widow's right to dower out of that house: — that the gift to the daughter was by a direction to the trustees to permit her to use occupy and enjoy the house, and the direction would be in vain unless he had previously given such an estate to the trustees, as would enable them to secure by their permission such occupation and enjoyment: — that the house was part of a general devise to the trustees of all his real estate; and the testator had not given the house to the trustees free from the widow's dower, unless he had so given his whole real estate. *

Again, where a testator devised to trustees a farm containing about 136 acres during the minority of his daughter the defendant, upon trust to carry on the business thereof, or let the same upon lease; and upon her attaining twenty-one made a devise of the same to her in strict settlement: and by the same will devised eighteen acres of land to his wife for life, remainder to the defendant in fee,

* Miall v. Brain, 4 Mad. 119.

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dower.

Where
widow will
not be put
to an elec-
tion be-
tween
dower and
a collateral
satisfaction.

A provision
made for a
wife, with-
out more,
will not
raise a case
of election.

and also bequeathed to his wife several specific and pecuniary legacies: — the question being whether the widow was entitled to dower out of the farm given to the trustees during the minority of the daughter, the Vice-Chancellor decided her not to be so, conceiving that the testator's intention that his trustees should, for the benefit of his daughter, have authority to continue his benefit in the entire farm must be disappointed if the widow could have assigned to her a third part of the land.¹ And he held the case to be within the principle of *Miall v. Brain*.²

III. In what cases a widow will not be compelled to elect between her dower and a collateral satisfaction, but be permitted to enjoy both.

Although a court of equity will not permit a widow, taking beneficial interests under her husband's will, to have her dower also out of his estates, when the same would be subversive of the dispositions contained in such will; but on the other hand will compel her to elect between the conflicting interests: yet if her taking dower would not operate to overturn the will in toto, and the gift to her is not said to be in recompence or satisfaction of dower, she may enjoy as well the interests communicated by the will, as her dower.

Two early instances have been adduced by Mr. Swanston³, wherein a court of equity has interfered to restrain a widow from enforcing her legal claim to dower, when the same was inconsistent with the intention either express or implied in an instrument conferring benefits in lieu of dower. But the case of *Lawrence v. Lawrence*⁴, which underwent great consideration, is usually referred to as having established the principle, that a general provision made by a husband for his wife will not be sufficient to raise a case of election, unless he has expressly declared such provision to be in lieu of dower, or must necessarily be presumed to have so intended. And it moreover proves, that the cir-

¹ *Butcher and Wife v. Kemp*, ² 1 Swanst. 398. in note; and
5 Mad. 61. ³ see supra, page 248.

⁴ Supra.

⁵ Bro. P. C. [ed. Toml.] 483.

circumstance of the gift being more valuable than the dower will not alter the case.

The case and several judicial decisions it underwent were as follows: A., being seised of certain manors and estates worth about the yearly value of 550*l.*, devised a manor and mansion-house and lands of the yearly value of 190*l.* to his wife during widowhood; and also made a farther provision for her, by directing, that after the determination of two years of a term of twenty-four limited to trustees, they should permit her to receive the rents of a farm included therein of 60*l.* per annum; and after five years of the same term were elapsed, should permit her to receive the rents of another farm included therein of 90*l.* per annum for the remainder of the said term, so long as she continued a widow; and he also bequeathed to her several pecuniary legacies. In 1698, shortly after the testator's death, the widow recovered judgment in a writ of dower for a third part of the lands not devised to her, and the same was set out. In 1699, Lord Chancellor Somers, on a bill brought by the first remainder-man, decreed a perpetual injunction against the widow to stay further proceedings upon the judgment obtained by her. This decree was reversed by Lord Keeper Wright in 1702, and the widow continued in the enjoyment as well of the lands devised to her, as those assigned for her dower.

In 1712, a bill was brought by a subsequent remainder-man to be relieved against the judgment obtained in dower; whereupon Lord Chancellor Cowper in 1715 declared, that as to the dower, it being a point of right, and so doubtful in its nature that the Court had been of different opinions therein, and the determination in 1702 having remained ever since unquestioned, he did not think fit to make any variation from what was then determined as to that point. Finally, Lord Cowper's decree was carried before the House of Lords in 1717, when the same was affirmed.¹

¹ And see Ld. Raymond, 458.; 234.; 8 Vin. Ab. 361.; 9 Vin. Ab. Lutw. 734.; 2 Vern. 363.; 1 Eq. Ca. 248.; Co. Lit. 36 b. n. (1.) [17th ed.] Ab. 218.; 2ibid. 386. 388.; 2 Freem.

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And where a testator devised certain lands to his wife, without mentioning the same to be in satisfaction of her dower; and devised the residue to his executors until his debts were paid: the Lord Keeper decreed the devise to be no recompence in bar of dower, but a voluntary gift.^k

And where a testator devised lands to his wife for life, and others to the plaintiff in fee; and the lands devised to the wife were of greater value than her dower, but were not expressed to be in satisfaction thereof; and she brought dower against the plaintiff, and recovered, against which judgment he brought his bill to be relieved: Lord Chancellor Parker said, the point had been already determined by the House of Lords, and that there was no relief in equity in such case, and dismissed the bill.^l

Money se-
cured to
wife by
bond after
marriage
will not of
itself put
her to an
election
between
that interest
and her
dower.
Parol evi-
dence
where not
admissible
to raise a
case of
election.
Devise of
annuity to
wife, with-
out more,
will not
raise a case
of election.

Also where a husband gave a bond in the penalty of 1,000*l.* for securing 500*l.* to his wife in case she survived; the same was held to be no bar of her dower: and though parol evidence was tendered of her acknowledgment that it should be so, yet the same was not permitted to be read, being within the statute of frauds^m and perjuries.ⁿ

Again, where a testator devised an annuity of 50*l.* to his wife for life, payable out of his freehold and copyhold estates, with a clause of entry and distress; and subject thereto, devised the same estates to his three children: Lord Hardwicke held the wife to be entitled both to her dower and the annuity.^o

The last-mentioned case, and that of *Pearson v. Pearson*^p, will be observed are inconsistent with those of *Arnold v. Kempstead*^q, *Villa Real v. Lord Galway*^r, and *Jones v. Collier*^s, but were nevertheless followed by Lord Thurlow in *Foster v. Cook*.^t

^k *Hitchin v. Hitchin*, 8 Vin. Ab. 361. in mar.; *Prec. Ch. 133.* freehold must be expressed or necessarily implied.

^l *Lemon v. Lemon*, 1 Eq. Ca. 353.; 8 Vin. Ab. tit. *Devise*, 366. ^m 29 C. 2. c. 3.

In *Estcourt v. Estcourt*, 1 Cox's Ch. Ca. 22., the Master of the Rolls observed, that *Lawrence v. Lawrence* and *Lemon v. Lemon* were founded on a misapplication of the general rule, which was, that a collateral satisfaction of the wife's

ⁿ *Tinney v. Tinney*, 5 Atk. 8. ^o *Pitts v. Snowden*, 1 Bro. C. C. 292. in note.

^p *Infra*, page 259. ^q *Supra*, page 250.

^r *Supra*, page 251. ^s *Supra*, page 252.

^t *Supra*, page 259. ^u *Infra*, page 259.

An intention that a wife shall not claim both her dower, and also a benefit under her husband's will, arises from necessary implication or express declaration; if therefore no such intention results from the will, or if no such declaration appears, she will be entitled as well to such benefit as to her dower.

Thus where a testator devised ten acres of land to his son, subject to an annuity of 10*l.* to his wife for life, and 5*l.* to his brother; and the provision for the wife was not expressed to be in bar of dower: — on the question whether the wife should have as well the annuity as her dower, she was held to be entitled to both, since there was nothing in the will to shew a contrary intention, which was necessary to make the provision a bar of dower. But it was said, that if the value of the land should not be sufficient to satisfy the two annuities and the dower, it would prove the wife's annuity was intended to be in bar.^u

This case proves Lord Chancellor Loughborough's opinion as to the inference from the annuity itself to have been, that the mere circumstance of giving an annuity out of an estate from which dower arises is not of itself a sufficient bar.^v

And where a testator devised all his real and personal estate to trustees, upon trust to pay his wife an annuity of 50*l.* during widowhood, and in case she married again, then to pay her an annuity of 30*l.* only: — on the question whether the wife was entitled to dower as well as her annuity, she was held to be so, the Lord Chancellor observing, that so far from a declaration plain, he had nothing even to lead him to think the testator meant to deprive her of dower.^w

This case seems to be somewhat similar to that of *Jones v. Collier*^x, which, as we have seen, was decided the other way: therefore Lord Thurlow was clearly of opinion, that

* Pearson v. Pearson, 1 Bro. C. " Foster v. Cook, 5 Bro. C. C. C. 292. 347.

^v See 2 Ves. jun. 580. in French ^x Supra, page 252.
v. Davies.

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An inten-
tion to put
a wife to
election
arises from
necessary
implication
or express
declaration.

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an annuity given to the wife out of the testator's estate, and a devise of all his estate subject to that, afforded no foundation of an intention to bar her claim paramount.^y

Also where a testator devised all his real and personal estate to trustees, in trust to lay out on mortgage, and pay his wife 80*l.* a year; she was held to be entitled both to her dower and the annuity.^z

So where a testator bequeathed an annuity to his wife during widowhood, and devised his freehold estate to his son A., the rents thereof to be applied for his maintenance and education during minority: the widow was declared to be entitled both to her dower and the annuity.^a

Where a widow will not be put to election between dower, and a remainder limited to her out of dowerable estate.

If a widow claim dower out of the very estate of which a remainder was limited to her by her husband's will, she will be allowed to take both the remainder and her dower, and not be put to an election. Therefore where a testator devised all his estate real and personal to trustees, in trust as to so much of his personal estate as was at P., to suffer his wife to enjoy the same for so many years as she should live; and as to his real estate and the rest of his personality, in trust for payment of his debts, and subject thereto, for raising 5,000*l.* for such of his children as should attain twenty-one; then that his real estate should remain to his first and other sons in tail general, remainder to his daughters, remainder to his said wife for life; and the testator died leaving four sons and two daughters: on a bill being brought against the wife, she by her answer, among other things, claimed dower out of the husband's real estate in addition to the interests she took under the will, insisting she had done nothing to bar herself of dower; and she was declared to be entitled thereto, though it was objected that the devises by the will were inconsistent with her claim, since the testator gave her the very estate in remainder out of which she demanded dower, and that therefore she must either take totally under the will, or

^y See 2 Ves. jun. 580. in French v. Davies.

^z Middleton v. Cater, 4 Bro. C. C. 409.

^a Strahan v. Sutton, 3 Ves. 249.

totally reject it: but the Lord Chancellor, after assimilating the case to *Lawrence v. Lawrence*^b, observed, the widow did not claim to overturn the will in toto, which distinguished the case from *Noys v. Mordaunt*^c, but merely claimed a temporary interest, and was only taking out that excrecent interest for a time.^d

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A bequest to a wife of the residue of personal estate will not create a case of election between that interest and her dower.

Bequest of
residue of
personality
to wife will
not create
a case of
election be-
tween that
interest and
dower.

For where a testator made a provision for his wife out of his personal estate by way of residue, without noticing her right to dower; she was held entitled to that, and also to her legacy; the Court observing, that by her claim to dower she did not break in upon the will, and that the testator might intend she should have the residue, which was an accidental benefit, as well as her dower.^e

And in order to put a widow to an election the intention of the testator must be clear, and not left to result from loose words or expressions made use of by him.

To put a
wife to
election
intention
must be
clear.

Therefore where a testator gave and devised all his real and personal estate to trustees, upon trust in the first place to pay his wife 480*l.*, and after payment thereof to apply the residue amongst his three children: — on the question whether the widow should be entitled as well to the legacy as her dower, the Master of the Rolls held her to be so, observing, that though the elder cases laid great stress on the whole real estate being disposed of by the testator, yet the inclination of the latter cases was not so strong against the widow, and some clearer indication of the testator's intention was expected to exclude her from her right of dower; or that if the widow took both dower and the provision under the will, some other part of the testator's disposition of his property would be defeated.^f

^b Supra, page 257.

^a Ayres v. Willis, 1 Ves. sen.

^c Supra, page 200.

230.

^d Incledon v. Northcote, 3 Atk. 430.

^e Thompson v. Nelson, 1 Cox's Ch. Ca. 447.

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All the cases that had been decided upon the doctrine under consideration previously to the case of *French v. Davis*^s were fully reviewed in the judgment of the Court upon that case. There a testator devised all his freehold estates upon trust to be sold, and gave certain benefits to his wife, and also an annuity during her life or widowhood, and directed his trustees to convert the residue of his personality into money : — and on the question whether the widow should be put to election to take the benefits given to her by the will or her dower, the Master of the Rolls, after observing that the case before him differed from the cases in *Ambler*^h, not being a claim of dower out of an estate from which the widow demanded an annuity, as those were, but the claim of an annuity out of a fund composed of the produce of the real and personal estate mixed together, and that he was glad he did not expressly contradict the authority of those cases, said, he did not feel that clear incontrovertible result from the will, that the testator meant to exclude his wife from dower ; and that when it came to a measuring cast, it was much better not to conjecture.

A testator's
constituting
his prop-
erty one
fund will
not ne-
cessarily
create a
case of
election.

And where a testator bequeathed to his wife an annuity of 150*l.* during widowhood, to be paid out of the produce of his real and personal estate, the residue whereof, in the event of his death without leaving any child, he devised to a sister : the widow was held entitled both to the annuity and her dower, though a distinction was attempted between this and prior cases, by reason of the testator having made the whole of his property one fund.ⁱ

Devise to
wife of por-
tion of es-
tate where-
out she is
dowable
will not put
her to elec-
tion.

If a testator by his will devises to his wife a portion of an estate out of which she is entitled to dower, and neither expresses in terms, nor leaves it to be collected from necessary inference, that the provision he thereby makes for her is to be in bar of dower ; she will be entitled to dower out

^s 2 Ves. jun. 572.

^h Viz. *Arnold v. Kempstead, Villa Real v. Lord Galway, and Jones v. Collier, supra.*
Greatorex v. Cary, 6 Ves. 615.

of the residue of the estate, and not be driven to an election.

Thus where a testator, having devised all his freehold property to trustees, upon trust to pay debts and to raise 4,000*l.* and pay 200*l.* part thereof to his wife, directed, that as to his demesne, containing about 170 acres, together with his house, &c., they should permit his wife to enjoy the same for life, she paying 19*s.* yearly for every acre, exclusive of bog, and keeping the house, &c. in repair, and not setting to any person, save him who should be in possession of the remainder: — and on the question whether the widow was entitled to dower, and also to the provision made for her by the will, the Lord Chancellor, after stating it to be clear that the assertion of a right of dower as to the house and demesne would be inconsistent with the dispositions thereof contained in the will, said, he could not, on the whole of the case, think the testator had sufficiently manifested an intent that the beneficial interest in the house and demesne, given upon a reserved rent and under certain conditions, should be considered as a bar of dower out of the rest of the estate; and decreed accordingly.^j

Of a similar complexion to the last case is that of *Lord Dorchester v. The Earl of Effingham.*^k There a testator having purchased an estate called Stubbings, containing about 200 acres, by his will desired that his wife might have Stubbings House during her life, with the ground then in hand, about fifty-three acres; and directed that all his landed estates should be attached to his title as closely as possible: and on the question being raised upon exceptions taken to the Master's report, whether the widow was entitled both to that part of the Stubbings estate which was devised to her, and also to dower out of the residue, the Master having conceived it to be a case of election, the Court held her entitled to both interests, assimilating the case to that last cited; and observed, that the words in the

^j *Birmingham v. Kirwan*, 2 Scho. & Lef. 442. ^k Cowper's Ca. in Ch. 319.

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 tion to
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will about attaching the testator's land to his title as closely as possible created no inconsistency with the claim of dower, which might postpone or abridge such object in the testator, but was not absolutely inconsistent and incompatible therewith; and that both object and claim might stand together.

**Case where
 widow will
 not be put
 to election
 by reason
 of testator's
 dispositions
 not taking
 effect.**

If a testator makes a provision for his wife by will, intending the same to be a satisfaction of her dower, or any claim she might have inconsistent with his other dispositions; and in consequence of those dispositions not taking effect, the widow becomes entitled to some additional interest; she will not it seems be compelled to elect between the benefits she takes under the will, and any such interest.

For where a testator gave furniture and other things to his wife, declaring the same to be in full of her dower, thirds, and other claim out of his real or personal estate; and by codicil gave the residue to his wife for life, with power to dispose of the same after her decease with the approbation of his trustees; and she afterwards made a disposition without their consent: by the decree it was declared, that the widow, having disposed without the consent of the trustees, had not pursued her power, and that therefore the testator died intestate as to the residue, which ought to go according to the statute of distribution, viz. one-third to the husband of one of the testator's daughters, one-third to the child of his other daughter who had died, and the remaining third to the devisee of the widow.¹

And where a testator gave certain parts of his real and personal estate to his wife, declaring the same to be in full satisfaction and recompence of all dower or thirds she could claim out of his real or personal estate; and directed part of the residue of his personal estate to be invested in real securities for charitable purposes, which could not be sustained: the Master of the Rolls, being chiefly governed by the last-cited case, decreed that so much of the residue of the personal estate as was vested

¹ Sympson v. Hornsby and Hutton, cited 3 Ves. 335.

in real securities was divisible according to the statute of distribution, viz. one half to the widow, the other to the next of kin.^m

It is observable that in this case His Honor seems to have inclined to the opinion, that if a man devised his real estate from his heir, after giving his widow a provision in lieu of dower, and the devisee died in the life of the devisor, the heir would take the estate, and bar the widow of dower.ⁿ

If a husband by his will assumes to dispose of a chose in action belonging to his wife, and directs that she shall make no claim to dower out of his estate, yet she will not be compelled to elect between those two interests, a husband having no power to dispose by will of his wife's choses in action: — and in all cases of election there must be some free disposable property.^o

Therefore where a feme-covert, an orphan of London, had the sum of 4,000*l.* lying in the Court of Orphans, and her husband died without having taken out the money, but having by his will bequeathed the same to her, provided she should not claim dower, and she afterwards brought dower against the brother and heir of her deceased husband, who thereupon brought his bill to compel her to release her dower or renounce the devise, and obtained an injunction to stay proceedings in the writ of dower: — on a motion to dissolve the injunction, the question being whether the money was devisable, the same was held not to be so, and the injunction was accordingly dissolved.^p

IV. The commission of what acts by a widow, having an election to exercise between dower and a collateral satisfaction, will and will not be considered as a determination of such election.

^m Pickering v. Lord Stamford, 3 Ves. 332. Lord Eldon C. has said, he did not know that the doctrine of this case would apply to a marriage-agreement, for that the direct contrary was held in Davila v. Davila, 2 Vern. 724. See

10 Ves. 18. in Garthshore v. Chalie.

ⁿ 3 Ves. 337.

^o See accord. supra, page 237.

^p Pheasant v. Pheasant, 3 Vent. 340.

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considered
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tion to
dower.

Widow not
put to elec-
tion by her
husband's
disposition
by will of
her chose
in action.
In election
cases there
must be
some free
disposable
property.

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Election considered in application to dower.

Intention constitutes criterion of election having been made.

What period election may be kept open.

The taking possession is the most obvious mode of fixing an election.

It seems that the intention of the widow, as capable of being collected from certain acts done or things acquiesced in by her, must constitute the criterion upon questions whether an election between conflicting interests has or has not been made. Mere length of time cannot of itself form the governing principle, since we find that election may be kept open for fifty years, or rather that it may last until the whole of the testator's affairs are wound up, and the trusts of his will executed.^a

Possession taken by a widow of benefits offered to her by her husband's will in lieu of dower, or a substitutionary provision, affords the most obvious evidence demonstrative of an election.

As where upon marriage the husband covenanted to transfer 2,000*l.* stock to trustees, in trust to permit him to receive the interest for life, and after his decease to permit his wife to receive the interest for life in lieu of dower; and the husband never having made the transfer by his will devised all his real and personal estates to trustees, in trust to pay certain annuities, and then to pay the residue of the rents and profits of his real estate and the interest of his personal estate to his wife during widowhood, and appointed her executrix; and she upon her husband's death proved the will, and received the rents and produce of his real and personal estates, and afterwards filed her bill, claiming to elect to have the 2,000*l.* annuities transferred upon the trusts of the settlement: she was decreed to have made her election to take under the will, having taken possession under the same, and the estate being a free fund from the beginning. But the Lord Chancellor said, he wished it to be understood that this case turned upon the particular circumstance of the bill being filed without any ground, and containing no suggestion that the real or personal estate was in such a situation as to render it doubtful what the result would be.^b

^a See 3 Bro. C.C. 90.; and 1 Ves. jun. 172., per Ld. Ch. in *Butricke v. Brodhurst*, alluding to the case of *Beaulieu v. Lord Cardigan*, Ambl. 533.

^b *Butricke v. Brodhurst*, 3 Bro. C. C. 88.; 1 Ves. jun. 171.

But if the period of time during which a widow has apparently acted upon an election be not of so long continuance as to render it improbable she made the election without a full knowledge of her husband's circumstances and her own rights, she will not be bound by such election.

As where a testator bequeathed a legacy of 100*l.* to his wife, and gave all his estate and effects upon trust, subject to an annuity of 35*l.* to his wife for life, for his son by a former wife; and a case of election was thereby created⁴; and the widow, after receiving the legacy and also the annuity for three years, brought her bill claiming both the interests under the will and her dower, which was about 80*l.* a year; she was held not to have precluded herself from making an election between such interests and her dower, not having acted with a full knowledge of the testator's circumstances and her own rights.⁵

Neither will an election be conclusive upon a widow, if it should turn out that at the time of her accepting one subject of election, she was not aware of its liability to certain incumbrances, and so made the election under an erroneous supposition.

Therefore where a testator by will made certain provision for his wife, which he declared should be in satisfaction of all dower free-bench or other customary estate she could claim out of his freehold copyhold or customary estates; and directed that within three months after his decease, she should release to his executors all such right; and the wife, not being aware of any ulterior claim upon the property so left to her, elected to take the same, and executed the required release; and the creditors of the testator afterwards succeeded in establishing their claim to have part of the property applied in payment of his debts: the widow was held not to be bound by her election, the same having been made under a mistaken impression.⁶

⁴ It may be doubted whether these circumstances would at the present day be held sufficiently strong to raise the question of election. ⁵ Wake v. Wake, 3 Bro. C. C. 255.; 1 Ves. jun. 335. ⁶ Kidney v. Coussmaker, 12 Ves. 156.

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dower.

Election
not con-
clusive, if
made with-
out a full
knowledge
of rights.

Widow not
concluded
by election
made in
ignorance
of its sub-
ject being
liable to
incum-
brances.

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*Widow en-
 titled to
 know her
 rights pre-
 viously to
 electing.*

We may lastly observe, that before a widow can be compelled to make an election, she is entitled to know what she has a right to under the will¹: and therefore if she does not possess the requisite information respecting the state and value of the property between which she has a right to elect, so as to enable her advantageously to exercise an election, she may file a bill for the purpose.²

It may be proper to add, that since writing the above a case has occurred whereby it has been decided, that if a testator be possessed among other property of money secured by an heritable bond in the *Scotch* form, and charging lands in *Scotland*, and in which his widow is by the law of that country entitled to a *terce* or third in life-rent; and the testator assumes to dispose of his property, including the bond debt, so that the widow is entitled to some interest therein, she must elect to take either under or against the will.³

The books furnish several cases touching the doctrine of election in application to testamentary dispositions made by freemen of the city of London before the statute of 11 G. I. c. 18.; the 17th section whereof removed the disability they were previously under of disposing of more than one third of their personal estate, and enabled them to dispose of the whole: — an inquiry into those cases is therefore rendered unnecessary, since the statute, by removing the cause which gave rise to them, removed also the means whereby the doctrine could be again called into application under the like circumstances. But cases may arise, wherein a widow will be put to an election between her customary share and the subject-matter of a settlement made upon her after marriage⁴, as to which point the several principles that have been detailed in the present chapter will be applicable.

¹ See 2 Ves. & Bea. 225. in Chalmers v. Storil.

² See 1 Ves. jun. 172. in Butricke v. Brodhurst.

³ Reynolds v. Torin, 1 Russ. 129.

⁴ See 2 Rop. Husb. & Wife, 23.

CHAP. IV.

THE DOCTRINE OF ELECTION CONSIDERED IN APPLICATION
TO COPYHOLD PROPERTY.^aI. *Under what Circumstances the Doctrine has Application.*

THE doctrine of election has long been held applicable to copyhold property ; and those cases in which it has been administered have arisen where testamentary dispositions have been made affecting that property, without a previous surrender of the same to the uses of the will, and certain benefits have been communicated to the customary heir on whom the legal estate in the property has descended for want of such surrender :—there the heir has not been permitted to take both the estate and the benefits conferred upon him, but been compelled to elect between the two interests.

Application
of the doc-
trine.

And although the doctrine has been partially superseded in consequence of the statute^b which was passed for the purpose of removing certain difficulties in the disposition of copyhold estates; yet as it may be necessary to consult the doctrine with reference to cases prior to the enactment of that statute; and since the statute itself, in the construction it has received, has been held only to supply surrenders which are merely matters of form and not of substance^c; it is proper that some notice should be taken of those cases wherein the doctrine has been applied to this species of property.

^a On the subject of this chapter the reader is referred to Scriv. Cop. 331. [2d ed.] and the several notes of cases to which reference is there made.

^b 55 G. 3. c. 192. ^c See accord. Doe v. Bartle, 5 Barn. & Ald. 492.

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Cases illus-
trating the
doctrine.

II. Consideration of the Cases illustrating the Doctrine.

The first case to be met with wherein a court of equity has applied the doctrine of election to copyhold property appears to be that of *Frank v. Standish*.^d There a testatrix, having surrendered her copyhold estates to the use of her will, made an exchange of some parts of them for other copyhold estates, and then devised all her freehold and copyhold estates with divers limitations, under which A. and B., two of her three co-heiresses, were beneficially entitled; and A., and C. the third co-heiress, were pecuniary legatees:—and the question being whether the co-heiresses claiming under the will could take the copyhold estates, which having been taken in exchange had not been surrendered to the use of the testatrix's will, it was held they could not, but must elect between those estates and the benefits they took under the will. And the case was assimilated to that of *Noys v. Mordaunt*.^e

And where a testator devised all the freehold and copyhold estates of which he should die seised, (the copyhold part whereof he stated to have surrendered to the use of his will,) upon trusts for sale, under which his heirs at law took interests; and it appeared that one of the copyhold estates, which had been surrendered to the use of the will, did not pass, but descended to the heirs at law of the testator on account of an entail that had not been barred: the Master of the Rolls held it to be clear that the testator meant to pass the entailed copyhold, and that therefore upon the common doctrine that no one claiming under a will could contravene it, the heirs must elect.^f

To put cus-
tomy heir
to election,
testator's
intention
must dis-
tinctly
appear.

In order that a customary heir may be put to an election, it has been held requisite that the intention of the testator to dispose of that which the heir claims as descending to him should distinctly appear.

Therefore where a testator devised and bequeathed all his real and personal estate to trustees, in trust for his wife

^d Reported in note to 15 Ves. 391.; and in note to 1 Bro. C. C. 588.

^e Supra, page 200.
^f *Wilson v. Mount*, 3 Ves. 191.

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for life, remainder for A., who was his heir at law, absolutely; and the testator at the time of his death was seised of a freehold estate of inheritance of about 140*l.* a year, and of a copyhold estate of the annual value of about 200*l.*, which he omitted to surrender to the use of his will; and after the testator's death A. claimed the copyhold as heir at law for want of a surrender, and also the freehold and personal estate in remainder under the will, and brought his bill against the widow for an account of the personal estate, and to have the trusts of the will performed: on a cross bill being filed by the widow to compel A. to make his election either to take under the will or as heir at law, the Lord Chancellor was clearly of opinion that the case was within the determination of election, and that the plaintiff A. must make his election accordingly. And His Lordship also held, that A. had determined his election to take under the will, by an agreement he had entered into with the widow for buying her interest in the personal estate.^a

In this case, the Lord Chancellor seems to have relied upon the provision made by the testator respecting the house at W., which was part of the copyhold estate, and not upon the general words; since, from the circumstance of that provision, it clearly appeared that the testator had before, under the general words, given the copyhold estate as well as the freehold; for his wife could not continue to live at W., unless she took it under the general words.^b

And where a testator devised to a grandson by a daughter the several copyhold estates he held of the manor of B., and also gave some legacies to the defendant his eldest son; and the testator held two estates of the manor of B., in one of which only he had the legal estate, but the same had not been surrendered to the use of his will: the Master of the Rolls held, that it having been the intent of the testator to pass this estate, a person claiming under the will must admit the whole; and that perhaps the testator's

^a Unett v. Wilkes, Ambl. 430.; ^b See 13 Ves. 175. in Judd v. Pratt.
^a Eden's Rep. 187.

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 in applica-
 tion to
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 property.*

intention was, to leave it to the option of the defendant to forfeit his claims by the will in disputing this.¹

Although a devise under general words of an unsurrendered copyhold estate has not been held sufficient to indicate an intention on the part of the testator, that his heir, taking benefits under his will, should elect between those benefits and the copyhold estate, where such words could be satisfied by their application to freehold property;² yet where the will disclosed a manifest intention to devise a copyhold estate which had not been previously surrendered, the heir was compelled to elect.

Thus where a testator, after disposing of a portion of his property, devised all other his real estates, as well copyhold as freehold, (the copyhold part whereof he stated to have surrendered to the use of his will,) and all his personal estate to trustees, upon trust to sell, and amongst other trusts, to invest so much of the sale monies as would secure an annuity of 300*l.* to his eldest son; and the testator had only one copyhold estate, whereto he had never been admitted; and which he consequently had not surrendered to the use of his will: the intention shown by the testator to pass the copyhold estate was held sufficient to oblige the heir to elect between that and the annuity.³

And in a very recent case, where A. devised all his freehold hereditaments to trustees, and directed them to sell the same, and also all his copyhold hereditaments, superadding this expression, "*and which I have surrendered to the use of this my will,*" and to invest the money produced by the sale in securities, and out of the interest to pay certain annuities to his widow and daughters and his son B., who was his customary heir, directing that in case B. disturbed the will by making any claim to any part of his estate, the trustees should stop payment of his annuity:

¹ *Allen v. Poulton;* 1 Ves. sen. 121. ² *Rumbold v. Rumbold;* 3 Ves. 67.

³ See accord. *Judd v. Pratt,* infra, page 273.

and the testator at the time of his death was seised of two copyhold estates, one of which only he had surrendered to the use of his will: and B. afterwards devised the unsurrendered estate to his wife: his Honor the Vice-Chancellor, after ruling that the expression, *and which I have surrendered to the use of my will*, was not intended by the testator as an exception to the generality of the disposition, and that the copulative, *and*, distinguished the case from that of *Wilson v. Mount*¹, decreed that the customary heir must elect to take either under or against the will.²

But since to the putting of an heir to election it is necessary that the intention of the testator should distinctly appear, unless such intention be clearly manifested, no election will arise.

Therefore where a testator, being seised of freehold and copyhold estates which lay intermixed, and the copyhold part whereof he had omitted to surrender to the use of his will, after devising a freehold messuage to two persons for their lives, devised all the residue of his real and personal estate to trustees to be sold; and after directing the payment of his debts out of the sale monies gave, among other legacies, 500*l.* to his heir at law; and bequeathed the residue to the nephews and nieces of a deceased brother, one of which nephews was the heir at law: — on the question whether the heir ought not to elect between the benefits under the will and the copyhold premises, the testator's intention was held not to be so clearly marked as to put the heir to his election.³

The Lord Chancellor upon the appeal of this case⁴ said, it was not the ordinary question whether the want of a surrender was to be supplied, but whether the testator had manifested an intention to pass the copyhold estate, which was however only another mode of expressing the same idea; as, if he had manifested that intention, all the cases proved that the Court would supply the surrender for cre-

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Unless tes-
tator's in-
tention be
clearly ma-
nifested, no
election
will arise.

¹ 5 Ves. 191.

² Judd v. Pratt, 15 Ves. 168.

³ Strutt v. Finch, 2 Sim. & Stu.

⁴ See 15 Ves. 390.

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 considered
 in applica-
 tion to
 copyhold
 property.*

ditors, the wife, or children : — that the question therefore was properly, whether the words, *all the rest residue and remainder of my real estate whatsoever and wheresoever and of what nature or kind soever*, manifested the intention to pass copyhold estate ; and that the Courts had in all these cases said, that those words were not a sufficient indication of that purpose, except for the satisfaction of debts : — that it came therefore to the same thing : — if the intention was manifest, the surrender would be supplied, and the case of election arose : but that the same authorities which bound him to say the intention was not manifest, bound him also to say it was not manifest for the purpose of raising a case of election.

**Deeisee
 bound by
 election of
 devisor.**

Where a testator disposed of copyhold property that had not been surrendered to the use of his will, and the heir at law, by the commission of certain acts, was considered as having elected to take under the will, his devisee was held bound by such election.

As where a testator devised a copyhold estate to his heir at law for life, with remainders over, and made him executor and residuary legatee ; and the estate appeared not to have been surrendered to the use of the will ; and the heir took an enfranchisement of the estate from the lord, describing himself as the executor and devisee of the testator, and afterwards made a conveyance thereof, whereby he created a term of 1,000 years, in trust to raise money for the payment of debts after his decease, the residue of the trust to be for the benefit of the remainder-man in the testator's will : on a bill brought by the remainder-man after the son's death against his devisee to have a conveyance of the copyhold estate, insisting there was sufficient ground to presume a surrender, and that it was lost when the court rolls were burned, and that one could not dispute a will under which he had a benefit ; Lord Hardwicke decreed the plaintiff to be entitled to the estate, observing that the rule, that a person enjoying a benefit under a will must abide by it in toto, had been held in modern cases as well in taking a personal estate as a real estate under the

will, and then the heir's devisee was bound by such acquiescence:— that the evidence was very strong, particularly from the enfranchisement, for that if the son had intended to take as heir, he would have styled himself so: and that the son's limiting the residue after performance of the trust for the benefit of the remainder-man showed he intended the rest of the term should attend the inheritance.^{*}

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* *Cookes v. Hellier*, 1 Ves. sen. 234.

CHAP. V.

THE CONSEQUENCES OF ELECTION CONSIDERED.

I. *The principle of compensation as attendant upon an election to take in opposition to an instrument propounding a case of election considered.*

Conse-
quence of
an acqui-
escing elec-
tion.

THE consequences of a person electing either to accept of property offered to him by an instrument propounding a case of election as the price of his own property, or to retain the property originally belonging to himself, are as follows: first, if he elects to acquiesce in the disposition which the promoter of the election has assumed the power to make, by accepting the property offered to him, and suffering his own to go in the channel such promoter may have prescribed, he must do so upon the implied condition of wholly relinquishing his own property, over which a power of disposition has been assumed, in favour of the person to whom such disposition hath been actually but ineffectually made: secondly, if he thinks proper to refuse compliance with such disposition, by rejecting the terms of the implied condition upon which the property is tendered to him, and prefers rather to remain as to his own property *in statu quo*, then, in case his own property is equal to or exceeds in value the property intended for him, had he complied with the disposition made by the author of the election, the latter property must be wholly given up to the intended devisee of his own^a, as an entire or partial compensation for the loss he sustains, in consequence of

Conse-
quence of
a repug-
nant elec-
tion.

^a The disappointed devisee takes a creature of equity. See 1 Swanst. by act of the court; not by de- 424.
scent, not by devise, but by decree,

the disposition thereof not having been submitted to : but if, on the other hand, the property retained is inferior in value to the property tendered, then a question arises what disposition is to be made of the surplus value of the latter property.^b

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election con-
sidered.

With respect to those cases wherein a person put to election submits to the dispositions contained in the instrument causing the election, little or no discussion has arisen, or can arise, as to the manner in which the property assumed to be disposed of is to be treated, the necessary consequence of such an election being, that he must suffer the disposition made of his own property to have its full effect ; and since he stands in the character of trustee towards the person in whose favor such disposition is made, it follows he may be called upon to invest him with the legal estate in the property, by executing the requisite conveyances for that purpose : and sometimes we find that a direction to this effect has formed part of the decree.^c

When per-
son put to
election
stands in
the cha-
racter of
trustee.

Neither it seems can any discussion arise upon those cases, wherein the person put to election refuses to acquiesce in the disposition affected to be made of his property, and the estate intended to constitute the price of that property is inferior or only equal thereto in value ; for in such case, the rejected estate must wholly go to the person disappointed, as a partial or entire compensation for the property which the author of the election intended he should enjoy.

The recent case of *Gretton v. Hayward*^d throws further light upon the principle of compensation ; and moreover proves, that if one devisee, in consequence of an election by another devisee to take in opposition to a will, himself takes an interest not intended for him by the will, but which goes towards making good the provision left to him, he may notwithstanding insist, as against the party electing, to a satisfaction *pro tanto* out of the interest intended for

Where a
person, in
part sa-
tisfied, will
be entitled
to addi-
tional com-
pensation.

^b See *infra*, page 281.

^c 1 *Swanst.* 409.

* See accord. *Blake v. Bunbury*,

1*Ves. jun.* 525.

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election con-
sidered.*

the latter for the disappointment he occasions. The case was as follows : —

Serle Edward Hayward devised certain property to his wife Ann Hayward for life, with remainder to her children as tenants in common in fee ; and the widow, upon the testator's death, supposing herself to have taken an estate tail in the property, with remainder to herself in fee, levied a fine thereof to such uses as she should appoint ; and being also seised of an estate in her own right, she by her will devised a moiety of part of the property devised by her husband, to her grandson George Gardner in fee, and the other moiety to trustees, for the benefit of Jane Hayward the widow and the children of William Hayward a deceased son ; and the residue of the property coming to her from her husband she devised to her daughter Elizabeth Hayward in fee ; and the estate to which she was entitled in her own right she also devised to the said trustees, for the benefit of the said widow and children.

By a decree made in a suit that had been instituted it was declared, that the children of William Hayward must elect either to take under or against the will of Ann Hayward ; and accordingly three of them, being adult, elected to take against the will, and the two others being infants, the Master reported that it would be for their benefit to make a like election. Things being in this state, a petition was presented by Elizabeth Hayward, stating to the effect, that as the estates of Serle Edward Hayward were let at rents amounting annually to 870*l.*, whereof the portion devised to her by Ann Hayward amounted to 600*l.*, the residue being devised by her in moieties of 135*l.* each, one to George Gardner, the other to Jane Hayward and the children of Wm. Hayward, to whom she had also devised her own estate of the annual value of 115*l.*, and who therefore under that disposition would take to the amount of 250*l.* only, she, the petitioner, and George Gardner would each take one-sixth of Serle Edward Hayward's estates, amounting to 145*l.* per annum, and Jane Hayward and her children would take the remaining four-sixth parts, amount-

ing to 580*l.* per annum, whereby Gardner derived a benefit of 10*l.* per annum, and Jane Hayward and her children, (independently of Ann Hayward's own estate, which she devised to them,) of 445*l.* per annum, while the petitioner sustained a loss of 455*l.* per annum, praying therefore that she might be declared entitled to the estate of which Ann Hayward was so seized in her own right, by way of compensation, as far as the same would extend, for the loss she, the petitioner, sustained by reason of Jane Hayward and her children having elected to take the estates so devised to her, the petitioner, by Ann Hayward.

And the Master of the Rolls in giving judgment said, that under the election of the widow and children of William Hayward to abide by the will of Serle Edward Hayward, the estates of the latter becoming divisible, the petitioner took one-sixth; and the question was, whether, having by the election of other persons acquired a right not intended for her by her mother, she could insist on satisfaction for the disappointment of the devise contained in her mother's will, while she enjoyed a benefit which had come to her against that will: — that the question was certainly new, no case having occurred in which an individual in part satisfied, deriving from one source a partial, had been declared entitled to additional compensation: — that to the extent of the difference between 145*l.* and 600*l.* she sustained the character of disappointed devisee, and the difficulties of calculation might be removed by a reference to the Master. And he thought that the circumstances of novelty could not so entrench on the entirety of the principle, as to authorize him in refusing compensation.

The principal peculiarity of this case, and in which it seems to have differed from any that had gone before, consisted, as we have seen, in the circumstance of Elizabeth Hayward having, in consequence of an election by others, taken an interest under her father's will not intended for her by the will of her mother; whereupon the question arose, whether she could insist on compensation for the disappointment of the devise contained in her mother's

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will, while she enjoyed a benefit which had come to her against that will, so far at least as such devise was not compensated for by that benefit; and this question was decided in the affirmative.

This case also induces the conclusion, that whether the person refusing to acquiesce in the dispositions made by his ancestor's will be the heir or not, and if the heir, whether alone or with others, makes no difference; and that such person will not in either case be permitted to take the estate over which it was competent for the ancestor to exercise a control.

Upon the principle of compensation it may be further remarked, that if the interest of a person in any property be accelerated in consequence of an election having been exercised by another, and be thereby rendered more valuable; the Court will not permit advantage to be taken of such acceleration, but will lay hold on such increased value, and compensate thereout persons who sustain a prejudice by reason of the election made.

Therefore where an election made by a wife to take in opposition to a will caused a deficiency in the legacies, in consequence of her being let in upon the personal estate; the Lord Chancellor thought it the highest equity that B., who had by the election gained possession of an estate of which he would have had but the reversion if the wife had elected to take under the will, should contribute what he was benefited by the election towards raising a fund for payment of the legacies. And his Lordship thought 4,000*l.* in reversion worth about 3,000*l.* in possession, and decreed that according to such estimate the value of the lands, being settled by the Master, should be charged if the legacies required it.^e

Whether
compensa-
tion is ap-
plicable on
an election
against
Crown-
grants.

It may be here observed, that admitting the doctrine of election to be applicable to grants of the Crown, which is a doubtful point, yet it may be still more dubious whether, supposing the person put to election to renounce what the

• Webster v. Mitford, 1 Eq. Ca. Ab. 562, 563.; and see the case stated 1 Swanst. 435. 449.

grant assumed to give him, the principle of compensation could be applied, and the rejected property be laid hold on by the Court for making satisfaction to the disappointed grantee.^f

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Cases may indeed be supposed, wherein some difficulty might be found in applying the principle of compensation; as if a testator assumed to dispose of another man's property, for which, in consequence of its having descended from his ancestors, or from some other motive, he had acquired a particular attachment, and also bequeathed to him certain considerable interests, far exceeding in point of pecuniary value the property disposed of. Now supposing the disposition made by the testator not to be acquiesced in, then the disappointed devisee would be entitled to such a proportion of the interests as would be equivalent to the value of the property assumed to be disposed of: but the value of this property is much greater in the estimation of its owner, than of the devisee: by what standard then, it may be asked, is the value to be ascertained; what is to be the criterion?—In such a case however the seeming difficulties would probably be overcome on a reference to the Master.

II. *The principle of forfeiture as attendant upon an election to take in opposition to an instrument propounding a case of election considered, and as to what instruments it is applicable.*

Principle of
forfeiture
considered.

But supposing the dispositions made by the author of an election case not to be acquiesced in, and the property constituting the free disposable fund to exceed in value the property over which a power has been assumed, then, although it may be considered clear that compensation must in the first instance be made out of such fund to the disappointed devisee, proportionate to the value of the property intended for him, yet it seems to be a doubtful

^f See Cumming v. Forrester, 2 Jac. & Walk. 354. 345.; and see supra, page 183.

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point what is to become of the surplus value of that fund ; whether it may be laid hold on by the person refusing compliance with the dispositions made, or by his conduct he will be considered as having forfeited all manner of claim thereto ; or whether it will revert to the representative of the person originating the election, having regard to its real or personal character.

No case clearly elucidating this point has yet occurred, and the improbability of its occurrence is obvious enough, since, the free fund being in general more valuable than the property over which a power is assumed, the person put to election will in most cases readily acquiesce in the implied condition, as his interest will be thereby more or less consulted.

Should however a case calling for a precise decision of the point at any time arise, the dicta which have occasionally fallen from learned Judges may afford some rules or arguments respecting the adjudication it would probably receive.

Some of those dicta would seem to import, that *absolute forfeiture* of the free fund is the necessary consequence of an election to take in opposition to the instrument causing election ; while there are others which would rather induce the conclusion, that the surplus of the free fund might be claimed by the person put to election, after compensation made thereout to the person disappointed.

But it should be observed, that some of these dicta may have been uttered, without an intention on the part of those from whom they fell to apply them to the particular point of absolute or partial forfeiture, and are therefore to be received with the greater caution. Those importing absolute forfeiture were probably addressed to cases, wherein the free fund was inferior in value to the property for which it was intended to be taken in substitution ; and upon this supposition they are in point of fact correct, since the non-acquiescence in the proposed terms of election would operate as a forfeiture of the tendered estate.

Some of the dicta, which on the face of them seem to induce the conclusion that absolute forfeiture is necessarily consequent upon a non-compliance with a proposed case of election, are of the following nature: — “ It is admitted that every devisee must confirm the will in toto, if he claims any interest under it, and will consequently forfeit such interest, if he impeaches or intercepts any part of it.”^s — “ Suppose in a will a legacy is given you by one clause, by another an estate of which you are in possession is given to another person; while you hold that, you shall not claim the legacy.”^t — “ Election is, where the testator gives what does not belong to him, but does belong to some other person, and gives that person some estate of his own; by virtue of which gift a condition is implied, either that he shall part with his own estate, or shall not take the bounty.”^u — “ If a testator, intending to dispose of his property, and making all his arrangements under the impression that he has the power to dispose of all that is the subject of his will, mixes in his disposition property that belongs to another person, or property as to which another person has a right to defeat his disposition, giving to that person an interest by his will; that person shall not be permitted to defeat the disposition where it is in his power, and yet take under the will.”^v

But other dicta are to be met with whence it may be inferred, that in case a person elect to take against an instrument causing an election, and the rejected property be greater in value than his own, he will nevertheless be entitled to the excess in value after compensation has been made to the party disappointed. And first, the definition of election given by Lord Chief Justice De Grey clearly seems to involve the principle of compensation as distinguished from forfeiture.^w Lord Commissioner Eyre also

^s See 1 Bro. C. C. 292. in Villa Real v. Lord Galway, in note.

^t See 2 Ves. jun. 696, 697. in Wilson v. Lord John Townshend.

^u See 10 Ves. 609. in Broome v. Monck.

^v See 13 Ves. 220, 221. in Thelusson v. Woodford.

^w See *supra*, page 176.

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Dicta in-
clining to
principle of
absolute
forfeiture.

Dicta in-
clining to
principle of
partial for-
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recognized the principle of compensation alone by stating, that "if a man takes upon himself to devise to B. lands to which he has no colour of title, and which are in the possession or are the inheritance of A., to whom some part of the testator's estate real or personal is also devised; A. must either renounce to the extent of his own estate the estate devised, or must convey his own estate to B."¹ And the Master of the Rolls in *Whistler v. Webster*^m said, "if a testator disposes of the estate of A., to whom he gives some interest by his will, A. shall not take that, unless he gives up his estate to that amount." Again, the principle, as we have seen, was explicitly defined by the Master of the Rolls in *Welby v. Welby*ⁿ; and formed part of Lord Eldon's definition of the doctrine of election in *Rancliffe v. Parkyns*^o, which he stated thus: — "if I choose to devise my real estate to the Noble Marquis opposite, and in the same will I dispose of an estate which is not mine but his; a court of equity will say, that he shall take no benefit from that will, unless he makes good the whole of the will: and the Noble Marquis could not take therefore, unless he allows the whole of the will to be effectual, that is, suffers his own to be disposed of according to the will, or makes compensation for as much as he takes of mine." And in *Ker v. Wauchope*^p his Lordship said, "in our courts we have ingrafted upon the primary doctrine of election the equity as it may be termed of compensation. Suppose a testator gives his estate to A., and directs that the estate of A., or any part of it, should be given to B.; if the devisee will not comply with the provision of the will, the courts of equity hold that another condition is implied, as arising out of the will, and the conduct of the devisee; that inasmuch as the testator meant that his heir at law should not take his estate which he gives A., in consideration of giving his estate to B., if A. refuses to comply with the will, B.

¹ See 1 Ves. jun. 523. in *Blake v. Bunbury*.

^m 2 Ves. jun. 372.
ⁿ Supra, page 205.

^o Supra, page 234.

^p 1 Bligh's P. C. 25, 26.; and see 2 Jac. & Walk. 339. in *Cumming v. Forrester*.

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shall be compensated by taking the property or the value of the property which the testator meant for him out of the estate devised, though he cannot have it out of the estate intended for him." The late Master of the Rolls¹, in allusion to the definition given by Lord Chief Justice De Grey of the doctrine of election², said, he conceived it to be the universal doctrine that the Court possessed power to sequester the estate till satisfaction had been made, not permitting it to devolve in the customary course; out of which sequestered estate so much was taken as was requisite to indemnify the devisee; if insufficient, it was left in his hands.³

The opinion of Lord Eldon C., as deducible from the dicta that have occasionally fallen from him, may probably be considered rather to incline to the principle of compensation or partial forfeiture than that of absolute forfeiture in cases arising upon wills; for as regards cases arising upon deeds founded on contract, we shall presently see⁴ that his opinion is the other way. In *Ker v. Wauchope* his Lordship, as we have above seen, is made to say, "that inasmuch as the testator meant that his heir at law should not take his estate which he gives A., in consideration of giving his estate to B., if A. refuses to comply with the will, B. shall be compensated by taking the property or the value of the property which the testator meant for him out of the estate devised, though he cannot have it out of the estate intended for him."

Now assuming the testator's estate, in the case put by his Lordship, to exceed in value A.'s estate, and assuming A. not to acquiesce in the will, it might be inferred from the above reasoning that A. should nevertheless be entitled to such excess; for, says his Lordship, "the testator meant that his heir at law should not take his estate," — and that "B. shall be compensated."

¹ Sir Thomas Plumer.

² See supra, page 176.

³ See 1 Swanst. 423, 424. in

Gretton v. Hayward.

⁴ See infra, page 287.

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 to have thus expressed himself: — “ I had a general notion, that if a testator devises the estate of A. to B., giving property of his own to A., and immediately after the will is found the question is proposed to A. to elect what he will do, *in that case his election to take his own estate requires only compensation*: but I dare not trust to general recollection upon that.”

And in his judgment upon the same case he is said to have observed^b, that the question was, whether the defendant, in the event of his electing to take against the will, was bound to forfeit all the benefits he took under it, or whether he was only to make a compensation to the plaintiffs for what the testator intended them: — that on this point he had looked through all the cases with great attention, and they contained many dicta not easily reconciled: — that though it would perhaps be too much to say that that should be the rule universally, he thought the case before him one for compensation only: — that at the same time he was of opinion there might be cases, where not only compensation was to be made, but the whole was to be given up: — that he thought the old principle of the Court, till shaken by some later determinations, was compensation, but that it had since been shaken.

And in *Green v. Green*^c his Lordship intimated, that in the case of a will there was authority enough to say, the party is only to give up sufficient to compensate those who are disappointed.

From those cases wherein the person put to election also fills the character of heir at law to the person creating the election, and elects to take in opposition to the will, no decided opinion can be collected respecting what the application of the surplus would be in those cases where the person put to election, and electing to take against the

^a See 19 Ves. 662.

^b See 19 Ves. 669.

^c See 1 Rop. Husb. & Wife, 567.
in n. (a.) [2d ed.]

will, and the heir, are different persons; it must it seems go to the one or the other; the question is which of them; and when they are both represented by one person, the question ceases to have existence.

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Of this description are the cases of *Noys v. Mordaunt*^x, *Streatfield v. Streatfield*^y, the anonymous case in *Gilbert*^z, *Lady Cavan v. Pulteney*^a, *Welby v. Welby*^b, and *Tibbits v. Tibbits*^c.

In like manner, no decided opinion can be formed upon the above point from those cases wherein the person put to election, and claiming to take against the will, is also the personal representative of the person promoting the election; to which class the case of *Rick v. Cockell*^d may be considered to belong.

By those desirous of pursuing the point under consideration further, considerable information and assistance are capable of being derived from the very able notes of Mr. Swanston^e and Mr. Jacob^f, particularly as those gentlemen arrive at different conclusions.

With respect to deeds founded upon contract the inclination of equity seems to be, that in case a party be put to election by reason of any dispositions contained therein, and elect to take in opposition thereto, he must give up all interest whatever in the substitutionary estate in favor of the persons prejudiced by his election, even though the same, after full compensation has been made thereout, may exceed in value his own estate; so that absolute forfeiture, and not compensation merely, is in this case the consequence of not acquiescing in the dispositions assumed to be made.

Absolute
forfeiture
attendant
upon an
election
against a
deed
founded on
contract.

In reference to the above point Lord Redesdale C. has observed^g, that in case of a settlement made by a father, suppose part of the lands subject to an entail not barred,

^x Supra, page 200.

^d Supra, page 238.

^y Supra, page 202.

^e See 1 Swanst. 435. n. (a).

^z Supra, page 204.

^f See 1 Rop. Husb. & Wife, 566.

^a 2 Ves. jun. 544.

n. (a.) [2d ed.]

^b Supra, page 204.

^g See 2 Scho. & Lef. 267, 268.

^c 19 Ves. 656.; 2 Mer. 96.

in Moore v. Butler.

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and another part that could be well settled; it would be most mischievous to hold that the eldest son should have the benefit of the settlement as to the lands well settled, and not perform the contract of his ancestor as to the other part: — that it might happen that the estate settled on the wife and younger children was that which was subject to the entail, and that the estate over which the father had full power was limited to the eldest son.

The case of *Green v. Green*^b exemplifies these principles, and strongly shows the inclination of Lord Eldon's opinion respecting the principle of forfeiture as distinguished from that of compensation.

In that case certain estates, to which A. was entitled as tenant in tail in remainder expectant on the decease of the survivor of his father and mother, were upon his marriage limited, as to part, to the use of the father and mother successively for life, remainder to A. for life, remainder to the plaintiff, his intended wife, for life, remainder to the first and other sons of the marriage in tail; and as to other part, immediately to A. for life, remainder to first and other sons, subject to the trusts of a term of 800 years for raising younger children's portions: and certain estates, to which the plaintiff and her parents were entitled in fee, were limited, after the decease of such parents, to the same uses as the former estates were limited upon after the decease of A.'s parents: — upon the decease of A., his own and the plaintiff's parents being previously dead, the defendant, his eldest son, entered into possession of part of the estates settled by the plaintiff and her parents, as tenant in tail thereof under the settlement; and the plaintiff entered into possession of part of the estates settled by her husband and his parents as tenant for life thereof; but the defendant claimed to be entitled thereto as tenant in tail by virtue of his original title, the estate tail therein not having been barred, and brought ejectment against the plaintiff for the recovery thereof: and the Lord Chancellor

^b 2 Mer. 86. 94.; 19 Ves. 665.

observed, that A. became a purchaser for himself and his family of the estates conveyed on the part of the wife; and being tenant in tail of his own estates, he did not effectually convey his interest, and his son now claimed the latter estates by virtue of his original title: — that the question was, should he be permitted to take, without making good the contract entered into by his father on his marriage? And his Lordship said, he certainly inclined to think that the defendant must either give up the whole of the benefit to which he was entitled under the settlement made on his father's marriage, or if he would not, that he must make good the contract: but that when he expressed himself as having formed this opinion, he was not able to find that it was directly supported by any former decision: — that the principle however was, that if a man would not give the price the parties meant he should give, he should not have the thing which was bargained for: — that the question under a settlement was different to that under a will, because, in the former case, an express contract had been entered into between the parties.

But with respect to cases of election arising upon deeds of a voluntary nature, and not founded upon contract, if compensation only, as distinguished from absolute forfeiture, is to follow an election to take against the dispositions thereby assumed to be made, and the free fund is the more valuable property, no more reason appears to exist for withholding from them such compensation principle than from wills.

Conse-
quence of
electing
against
deed of a
voluntary
nature.

III. *As to the power of election being controlled, and on whom it is conclusive.*

If the consequence of a person's electing to take in one way would be more beneficial to parties interested in the subject of election than in another, it seems the Court will compel an election to be made in that particular way.

Where
election
will be
controlled.

For where A. on his marriage covenanted, in consideration of a portion, to purchase land of 400*l.* per annum, and settle the same on himself and his wife for their lives, and the life of the survivor, remainder to the heirs of

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their two bodies; and it was provided that if A. died before such settlement, the wife might elect either to have the 400*l.* per annum, or 3,000*l.* paid her in lieu of dower and thirds; and the husband having died before any settlement made, the wife elected to have the 3,000*l.*, but the children insisted on having the land purchased: — the Court, notwithstanding the wife's election, decreed a settlement of land of 400*l.* per annum to be made.¹

Whether
election of
tenant in
tail will
bind issue,
quare.

Whether an election made by a tenant in tail will be binding upon the issue in tail seems at present undecided. The point was alluded to in the case of *Long v. Long*, and the Lord Chancellor said it might admit of a good deal of doubt; but it was not necessary to decide upon it.

Where
election
made by
parents will
not bind
their
children.

An election made by parents taking partial interests only in a subject of election will not be binding upon their children; — as if for instance property made the subject of election be settled upon a parent for life, with remainder to his children; an election by the parent to take under or against the instrument creating the election will not be conclusive upon the children.

This point was so decided by the case of *Ward v. Baugh*.² There a testator, having by articles previous to his marriage covenanted that in case he died in his wife's life-time, as the event happened, his representatives should, within six months after his death, pay the trustees 4,000*l.*, upon trust to place the same out at interest; and permit his wife to receive the interest for her life, and after her death to divide the principal equally among the children, and having had three children, by his will gave the interest of 1,000*l.* to his wife for life, and made other provisions for her; and also gave his executors 1,400*l.*, upon trust for the separate use of one of his children, a married daughter, and on her death to divide the principal equally between her children and their issue at twenty-one; and made similar but unequal provisions for his two other children;

¹ *Hancock v. Hancock*, 2 Vern. 605. ² 4 Ves. 405.

¹ 4 Ves. 623.

and declared that the provision thereby made for his wife and children should be in lieu of all claim under his marriage articles; and the married daughter having elected to take under the articles, a question arose whether such election would be binding upon the children; the Master of the Rolls said, that upon reading the will, he had no doubt the children would not be bound by the election of their parent: and they were accordingly declared to be at liberty to apply after their parent's death.

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CHAP. VI.

ON THE DOCTRINE OF SATISFACTION.

Analogy between doctrine of election and satisfaction.

CLOSELY allied to the doctrine of election, which forms the subject of the five preceding chapters, is the no less important doctrine of satisfaction, in some at least of the various branches into which it extends itself. The point of similarity between the two doctrines exists in reference to those cases of satisfaction, wherein it is incumbent on the party to be satisfied to elect either to abide by the instrument giving title to the subject *of* which it is intended satisfaction should be made, or the instrument giving title to the subject *by* which it is intended satisfaction should be made. There is indeed no disposing of the property of another, as in the case of election, which forms the leading feature of distinction between the two doctrines : — the case of election can arise only where a person affects to give something which is not his to give, but belongs to some other person, and gives that person some estate of his own. The connection however between the two doctrines is conceived to be such, as to warrant the introduction in this place of an exclusive chapter on the doctrine of satisfaction, which it is proposed to consider briefly, I. As between parent and child; II. As between husband and wife; III. As between strangers.

- I. Satisfaction considered as between parent and child.
 1. In what cases a provision made by a parent for his child will be considered as intended to go in satisfaction of a former one.
 2. In what cases it will not be so considered.
 3. As to cases of ademption, and when a legacy bequeathed by a parent to a child will and will not be adeemed by a subsequent advancement.

II. Satisfaction considered as between husband and wife,

1. In what cases a thing engaged to be done by a husband for the benefit of his wife will be considered as satisfied.
2. In what cases it will not be so considered.
3. As to the distinction between cases of satisfaction and those of performance, and in what cases the covenant of a husband for the benefit of his wife will be considered as performed.
4. In what cases it will not be so considered.

III. Satisfaction considered as between strangers ; wherein may be inquired, in what cases benefits voluntarily acquired by persons from those upon whom they have any unsatisfied claims will and will not be considered as a satisfaction thereof.

I. Satisfaction considered as between parent and child.

1. In what cases a provision made by a parent for his child will be considered as intended to go in satisfaction of a former one.

Those cases of satisfaction, which bear the strongest resemblance to cases of election, appear to be of that class wherein a provision is made for a child by virtue of some irrevocable instrument, and the parent, either by some act in his lifetime, or by will, afterwards makes some provision for such child, but without expressing that the same was meant to be a substitution of the former one. Under these circumstances the intention of the parent will in many cases be considered to have been, that the second provision should be taken in satisfaction of the first; and upon the strength of this presumed intention, the Court will interpose its authority to prevent the child from taking both provisions, and compel him to elect either the one or the other: and if the substitutionary provision is inferior in amount to the provision first made, it will be held to go in part satisfaction thereof^a: for the Court has been fre-

Where a provision made by a parent for his child will go in satisfaction of a former one.

^a See 2 Atk. 634, 635. in Weyland v. Weyland.

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considered
as between
parent and
child.

Court leans
against
double por-
tions.

Slight cir-
cumstances
will not
prevent case
of satis-
faction be-
tween pa-
rent and
child.

quently said strongly to lean against double portions and double provisions, the presumption being, that the parent is paying the debt of nature. But whatever foundation there might be for the original application of the rule that the second provision should not be a further gift, it is not now to be disputed, though it is obvious that the intent of the parent is as often disappointed as served by it.^b

Thus where by marriage settlement 4,000*l.* was provided for daughters; and there being two daughters, the father, without noticing the settlement, bequeathed to them 2,000*l.* apiece for their portions; the latter provision was held to go in satisfaction of the former.^c

Cases of satisfaction between parent and child depend on other grounds than cases of satisfaction between other persons; it having been long settled, that slight circumstances of difference between the two provisions as to their time of payment will not be sufficient to repel the presumption of an intended satisfaction, which with regard to third persons would be sufficient.^d

Therefore if on marriage a portion is secured to a child out of land, and the parent gives the child a portion in money equal to what is so secured, though payable at a different time; it shall by implication be a satisfaction, and if not equal yet a satisfaction pro tanto.

Thus where the trustees of a settlement were empowered to raise 3,000*l.* in case there should be two or more daughters, to be divided between them at eighteen or marriage; and a certain trust estate, being a term of ninety-nine years determinable on the father's death, was agreed to be sold for 2,000*l.*, of which 200*l.* was to be paid to the father, and 1,800*l.* to the surviving trustee; the latter sum was decreed to be taken in part of the 3,000*l.* portion, though to be paid at twenty-one or marriage.^e

^b See 2 Bro. C. C. 517. in Powel v. Cleaver. ^f See 2 Bro. C. C. 517. in Powel v. Cleaver. ^g See 2 Bro. C. C. 517. in Powel v. Cleaver. ^h See 2 Bro. C. C. 517. in Powel v. Cleaver.

^c Bloyes v. Bloyes, cited 2 Vern. 111.; and see Blois v. Blois, 2 Ch. Rep. 162.

^d See 6 Ves. 319.; 3 Ves. 466. in

Barclay v. Wainwright; 17 Ves. 191. in Hartop v. Hartop.

^e Jesson v. Jesson, 2 Vern. 255.; and see Thomas v. Keenish, ibid. 548.; Bruen v. Bruen, ibid. 439.; Macdowall v. Halfpenny, ibid. 484.

And where there was nothing but the circumstance of making the payment of the satisfaction fund three months after the wife's death, instead of at her death, — the period appointed for payment of the fund to be satisfied, — that difference was held insufficient to repel the presumption.^f

In the case of a legacy by a father to a child, as great or greater in amount than a portion to which the child was entitled, the intent of securing the portion is considered to have been only that the child might be provided for, which end is answered by the parent's giving an adequate or greater legacy by his will.^g

As where upon marriage the residue of the wife's fortune was invested upon trust, after the decease of the parents, to be divided amongst the children as the wife should appoint, and in default of appointment equally between them; and the husband by his will bequeathed 10,000*l.* to his executors, the interest thereof to be paid to his wife whilst sole, who was to have power to dispose of the principal amongst the children: the interest which the children took under the will was held to be a satisfaction for what they took under the settlement.^h

And if the substitutionary fund provided by will fall short of the sum to be satisfied, it shall be taken in part satisfaction thereof.

As where by settlement after marriage the husband's estate was limited in trust to raise 10,000*l.* for younger children's portions: and it was provided, that if the husband in his lifetime gave any sums of money to his younger children towards their portions, and so declared the same by writing, they should go pro tanto in satisfaction thereof; and he by will directed, that if he had one younger child, the trustees should raise 5,000*l.* for such child; if more, 2,000*l.* for each; and died leaving two children: the 2,000*l.* were held to go in part satisfaction of the provision made by the settlement. And the Court observed, that

^f Sparkes v. Cator, 3 Ves. 650. ^h Moulson v. Moulson, 1 Bro. See 1 P. Wms. 299. in Rawlin. C. C. 82.; and see Ackworth v. v. Powel. Ackworth, ibid. 307.

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considered
as between
parent and
child.*

A case of
satisfaction
will prima
facie be
intended.

Case of the
satisfaction
of a provi-
sion made
by an an-
cestor.

there was ground to suppose the testator had forgotten the prior provision, and that if he had, the bequest ought to go in part satisfaction.^j

And if portions are provided by any means whatsoever, and the parent gives a provision by will for a portion, it is a satisfaction *prima facie*, and unless there are circumstances to show it is not so intended.^j

And there may be a satisfaction, not only for what a parent had by his own act obliged himself to provide, but also for a provision made by an ancestor out of property settled upon or falling into the hands of the parent.

Thus where A. settled an estate upon himself for life, remainder upon his first and other sons in tail; with a proviso that if his son B. should die without issue male, and leaving a daughter, the trustees should raise out of part of the premises 6,000*l.*, to be paid to such daughter within a year after marriage, or at twenty-one; and B. after his father's death pursuant to marriage articles limited the estate, (including the premises charged with the 5,000*l.*) to himself for life, remainder to his first and other sons in tail, remainder to trustees for two hundred years for raising 8,000*l.* for daughters' portions, if no issue male; and B. having no issue male, by his will, reciting that he had only one daughter, appointed that she should have 8,000*l.* for her portion, but took no notice of the settlement made after his marriage; the daughter was held to be entitled to one portion only, but not to be precluded from electing the portion by her father's settlement, if on coming of age she thought the same more for her advantage than the portion by his will.^k

^j *Warren v. Warren*, 1 Bro. C. C. 305.; 1 Cox's Ch. C. 41.; and see *Duke of Somerset v. Duchess Dowager of Somerset*, 1 Bro. C.C. 309. in n.

^j See 3 Ves. 528, 529. in *Hinchcliffe v. Hinchcliffe*.

^k *Copley v. Copley*, 1 P. Wms. 147. [4th ed.]; 2 Eq. Ca. Ab. 659. pl. 4.; and see *Rawtins v. Powel*,

1 P. Wms. 297.; *Brook v. Bridges*, Moseley 108.; *Watson v. Lord Lincoln*, Ambl. 325.; *Wood v. Briant*, 2 Atk. 521.; *Seed v. Bradford*, 1 Ves. sen. 501.; which two latter cases seem to have shaken the authority of *Chidley v. Lee*, Prec. Ch. 228.; and see *Chave v. Farrant*, 18 Ves. 8. Lord Thurlow is reported to have said, that where

And where a testator, who is a parent, shall have discovered by the manner of his gift, or the circumstances of it as they appear upon the face of both instruments compared, an intention of providing to the outside for his child, in other words, of doing all that his parental discretion points out as proper to be done by him for the maintenance of that child, he indicates this to pass in his mind, that no other maintenance be demanded from him but that which he has thus measured in his own testamentary disposition.¹

The general run of cases as to the satisfaction of portions by some subsequent provision proceeds upon an intention implied. But if from an intention expressed in any instrument providing a portion for a child, it appears that the same should, if accepted, be taken in satisfaction of a former portion, it will of course be incumbent on the child to take one portion or the other: and then it matters not whether the second portion be of the same amount, and equally beneficial and certain, and of the same nature as the other, which rules have application only to simple legacies.²

Though the word "portion" applied as between parent and child will raise a case of satisfaction, yet if applied between other relations or friends it will not have that effect.³

2. In what cases a provision made by a parent for his child will not be considered as intended to go in satisfaction of a former one.

Although a provision made by a parent for a child will prima facie be presumed as intended to go in satisfaction either wholly or in part of a portion to which the child was antecedently entitled⁴; and although the Court, which leans against incumbering estates twice over where provi-

portions are charged on an estate which will go to the eldest son, the rule is, that additional portions on condition shall be like laws made after others, and repeal the former. See 1 Bro. C. C. 296. in Jeacock v. Falkener.

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considered
as between
parent and
child.

Intention
the cri-
terion of sa-
tisfaction.

Dissatisfaction
when inten-
tion is im-
plied, and
when ex-
pressed.

Force of
word "por-
tion."

Where a
provision
made by a
parent for
his child
will not go
in satisfac-
tion of a
former one.

¹ See 2 Bro. C. C. 364, 365.

² See Ryde v. Byde, 2 Eden's Rep. 19.; 1 Cox's Ch. C. 44.

³ See 2 Bro. C. C. 517. in Powell v. Cleaver.

⁴ Supra, page 296.

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as between
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child.

Thing sa-
tisfying
must be of
same nature
with thing
to be sa-
tisfied.

Money not
satisfied by
land.

Thing sa-
tisfying
must be as
certain as
thing to be
satisfied.

sions move from a parent to the same persons and for the same purposes, will overlook little circumstances of time as to the payment of the two sums³; yet these rules must be understood with some restrictions, as that the thing satisfying be of the same nature with the thing to be satisfied; so that money and land, being things of quite a different nature, the one shall not be taken in satisfaction for the other.

As where a father upon his daughter's marriage gave a bond to his son-in-law for part of her portion, and afterwards devised to him and his wife lands of greater value than the bond debt; it was held that the devise could not be presumed to go in satisfaction of the debt, though there was a deficiency of assets.⁴

And the thing given in satisfaction must be attended with the same certainty as the thing to be satisfied; if therefore it depends for its vesting upon the happening of some contingency, there will be no satisfaction; for what is contingent may be nothing; and a testator, especially too when a parent, cannot mean to give nothing in lieu of something: and in the construction of double portions, it has always been of weight that they were both certain.⁵

Therefore where a husband on his marriage settled some exchequer annuities for ninety-nine years to the amount of 300*l.* per annum in trust for himself for life, remainder for his wife for life, remainder for his children; and there being only one child, a daughter, he devised all his real and personal estate to his wife, charged with 10,000*l.* as a portion for his said daughter, payable at eighteen: the portion was held to be no satisfaction for the annuities, the Lord Chancellor observing, that the same was subject to a contingency, and not payable unless the daughter survived the age of eighteen years; and that it would be hard that a

³ See 3 Atk. 98. in Clark v. Sewell.

⁴ Goodfellow v. Burchett, 2 Vern. 298.; 1 Eq. Ca. Ab. 204. pl. 7.

⁵ See 2 Atk. 493. in Spinks v. Robins; Grimes v. Allieurs, cited 2 Bro. C. C. 356.

mere contingency should take away a portion absolutely vested, especially in the case of an only child.^{*}

And although the Court inclines to the presumption that where a second provision is made by a parent, or person standing in loco parentis, the same shall go either wholly or in part satisfaction of a former provision; yet if the second provision is not *eiusdem generis* with the former, the presumption will be in favour of its being considered accumulative.^t

So that the limitation of a life interest in the residue of real and personal estate to a child, entitled under his mother's marriage articles to have a sum laid out in the purchase of land after the death of his parents, will be no satisfaction for such sum, if the will contain no words warranting that construction.^u

But though a portion will not be satisfied by a provision not *eiusdem generis* therewith, or by a bequest of the residue of an estate; yet it does not necessarily follow that a residue may not under any circumstances be a satisfaction for a portion; for if the party make the provision or bequest with reference to a definite amount which he intended it should reach, entering into a calculation of its value, a case of satisfaction may be raised.

Thus where upon marriage it was covenanted that the executors or administrators of the intended husband should, within three months after his death, pay the trustees of the settlement 2,000*l.*, the interest thereof to be paid to the wife for life, and after her decease the principal to be paid to the children of the marriage: and there being issue of the marriage, one son, the father bequeathed

* *Bellasis v. Uthwatt*, 1 Atk. 426.; and see *Duffield v. Smith*, 2 Vern. 177. 258. 354.; 1 Eq. Ca. Ab. 204. pl. 6.; and the observations made in *Warren v. Warren*, 1 Bro. C. C. 310.; and see *Mathews v. Mathews*, 2 Ves. sen. 635.; *Hanbury v. Hanbury*, 2 Bro. C. C. 351. 529.

^t See *Grave v. Earl of Salisbury*, 1 Bro. C. C. 425.

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considered
as between
parent and
child.*

And must
be *eiusdem
generis*
therewith.

But a case
of satis-
faction may
be raised by
a bequest of
residue.

^u *Alleyn v. Alleyn*, 2 Ves. sen. 37. And in order to make out a case of satisfaction against a child of a sum which a parent is under an obligation to provide, the fund satisfying must consist of some free disposable property belonging to the parent. See accord. *Roberts v. Dixall*, 2 Eq. Ca. Ab. 668.; pl. 19.

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parent and
child.

to him his share in certain powder-works, and so much money as being added to such share would make up the full sum of 10,000*l.*; and the 2,000*l.* portion was never paid; the same was held to be satisfied by the bequest: and the Master of the Rolls said, that there was upon the face of the will a clear pecuniary bequest to some amount, which indeed was uncertain, depending upon the value of the powder concern; but that the testator, knowing the value of the share not to be 10,000*l.*, said, he meant to give in money all that the share fell short of such sum. And his Honor observed, he was by no means clear, that if the testator had confined himself to saying he gave as much of his residuary estate as should be of the value of 2,000*l.*, the same would not have been a satisfaction of the portion. *

Debt due
from parent
to child
when not
satisfied by
legacy.

A debt due from a parent to a child is no more satisfied by a legacy not equally benefited with the debt, as for instance depending for payment on a contingency, than a debt due from a stranger is satisfied by such a legacy, unless upon the face of the will, or from the circumstances as to the manner in which the testator has acted upon the property, it can be plainly proved he meant it so. ^v

Where sa-
tisfaction
will not be
presumed.

Where a father has advanced to a child a portion, though it may be presumed he intended to pay a debt, or satisfy a portion, yet such presumption is not warranted where the father has said what he meant to do; as that he meant to satisfy something else. *

The pre-
sumption of
a satis-
faction may be
rebutted by
parol evi-
dence.

And the presumption existing in the case of a parent and child, as to the satisfaction of a prior portion by some subsequent provision, is capable of being rebutted by parol evidence.^y There is however a great difference between parol declarations, as to the point whether they are all alike weighty and efficacious. A declaration at the time of making the will is of more consequence than one after-

* Bengough v. Walker, 15 Ves. 507.

^v See Ellison v. Cookson, 2 Bro. C. C. 307.; and 3 ibid. 61.; 2 Cox's

^w Tolson v. Collins, 4 Ves. 423.

Ch. C. 220.

^x Burges v. Mawbey, 10 Ves.

wards; and a declaration after the will as to what the testator had done is entitled to more credit than one before the will as to what he intended to do; for that intention may very well be altered; but he knows what he has done, and is much more likely to speak correctly as to that, than as to what he purposed to do, though these parol declarations are all alike admissible, whether consisting of conversation with people who have nothing to do with the matter, or in whatever form.² But in order to prevent the operation of the settled rule of law as to presumption, the evidence must be clear and satisfactory.³

3. As to cases of ademption, and when a legacy bequeathed by a parent to a child will and will not be adempted by a subsequent advancement.

A numerous class of cases is to be met with as to the satisfaction or ademption by some subsequent advancement of testamentary legacies, or portions provided by parents for their children. These cases do not assimilate themselves to those of election in the same manner as the cases of satisfaction above considered do, since they involve no choice; and the object with which they are here noticed is, for the purpose of distinguishing them from those cases of satisfaction which do involve an election or choice.

The rule of the Court upon this subject has been laid down to be, that where a parent, or person *in loco parentis*, gives a legacy to a child, not stating the purpose with reference to which he gives it, the Court understands him as giving a portion; and if he afterwards advances a portion for that child, though there may be slight circumstances of difference between the advance and the portion, and a difference in amount, yet, by a sort of artificial rule that he is paying a debt of nature, and a leaning of the Court against double portions, he will be intended to have the same purpose in each instance, and the advance is therefore an ademption of the legacy. And the legacy has in some

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When a
legacy by a
parent to a
child will
and will
not be
adempted.

No analogy
between
cases of
election and
those of
ademption
of legacies.

Rule as to
ademption
of legacies.

² See 7 Ves. 518, 522. in *Trimmet v. Bayne*; and see *Pile v. Pile*, 1 Ch. Rep. 199.; 1 Eq. Ca. Ab. 204. pl. 5.; and see further as to the admission of parol declarations in *Ellison v. Cookson*, 2 Bro. C. C. 307.; 3 Ibid. 61. ³ *Debez v. Mann*, 2 Ibid. 165. 519.

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child.*

*Exceptions
thereto.*

instances been held to be deemed by a subsequent portion, though less in amount, upon the ground that the parent, owing what is called a debt of nature, was the judge of that provision by which he meant to satisfy it.^b

This rule however is not without its exceptions, since it appears that if the legacy consists of a share of the residue, the same is not of a nature sufficiently certain to be satisfied either wholly or in part by a subsequent portion: for the idea of a portion *ex vi termini* is a definite sum, whilst the residue is from its nature indefinite, being subject to all such debts as the testator may contract, and such legacies as he may give.^c

Neither will the rule prevail where the parent expressly points out for what the portion shall be a satisfaction^d: nor if there be any thing to show that the portion was paid without an intention to redeem a legacy previously bequeathed^e: nor if the advancement be not *eiusdem generis* with the legacy.^f

*Distinction
as to
ademption,
where le-
gacy is be-
queathed by
a collateral
relation.*

And if a collateral relation, or person not standing in *loco parentis*, bequeath a general legacy to another, and afterwards advance the same person in his lifetime, the legacy will not be thereby held satisfied: he will be under-

^b See 18 Ves. 148. 151. 153. 154. in *ex parte Pye* and *Dubost*; and see *Jenkins v. Powell*, 2 Vern. 115.; and *Elkenhead's ca.* cited *ibid.* 257.; *Hale v. Acton*, 2 Ch. Rep. 35.; *Ambl. 326.* in *Watson v. Earl of Lincoln*; *Hartop v. Whitmore*, 1 P. Wms. 681. [4th ed.]; and n. (1) 1 Bro. C. C. 306. [5th ed.]; *Ward v. Lant*, Prec. Ch. 182.; 2 Atk. 518. in *Shudal v. Jekyll*; *Biggleton v. Grubb*, *ibid.* 48.; 7 Ves. 515. in *Trimmer v. Bayne*; *Monck v. Lord Monck*, 1 Ball & Beat. 298.: and the subsequent ratification of the will by codicil will not alter the case; see *Irod v. Hurst*, *Frem. 224.*; *Monck v. Lord Monck*, sup. *Lord Thurlow C.* is reported to have said, that with respect to the question of ademption, the case of parent and child is a presumption

of evidence only, not a presumption of law:—that as to its being considered the payment of a debt, the law does not compel the parent to give the legacy:—that the court can only mean a moral obligation, a laudable affection, which may exist in others besides a parent: see 2 Bro. C. C. 516, in *Powell v. Cleaver*.

^c See 2 Atk. 216. in *Farnham v. Phillips*; *Ambl. 327.* in *Watson v. Earl of Lincoln*; *Smith v. Strong*, 4 Bro. C. C. 495.; *Freemantle v. Bankes*, 5 Ves. 79.

^d *Baugh v. Reed*, 3 Bro. C. C. 192.

^e *Debeze v. Mann*, 2 Bro. C. C. 165. 519.

^f *Holmes v. Holmes*, 1 Bro. C. C. 555.; *Bell v. Colman*, 5 Mad. 22.

stood as giving a bounty, not as paying a debt: he must therefore be proved to mean it as an ademption either upon the face of the will, or, if it may be, and it seems it may, by evidence applying directly to the gift proposed by that will^s: for in general a man is entitled to as many gifts as another chooses to bestow upon him, and a second is not a substitution for the first.^t

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considered
as between
parent and
child.

And if a legacy is given to a person standing in the relation of a natural child to the testator, and he afterwards advances that child, the law does not admit the conclusion *prima facie* that the testator at the time of making the will recognized that relation.^u

Case of a
natural
child.

It seems however that a man may so describe himself as that the gift by will, and that in his lifetime, may be intended for the same purpose; but it must appear that he intended to put himself *in loco parentis*; for there are no cases where it has been so held, if the second gift appeared to be *diverso intuitu*.^v

A testator
may so de-
scribe him-
self as to
induce an
ademption.

As to cases of ademption between parent and child, it is observable that they differ from those upon the performance or satisfaction of covenants in this;—that in the former, the Court overlooks small differences in the circumstances of that which is proposed to be given, and that in satisfaction of which it is contended to be given.^w

Distinction
between
cases of
ademption
and those
of perform-
ance of co-
venants.

II. Satisfaction considered as between husband and wife.

1. In what cases a thing engaged to be done by a husband for the benefit of his wife will be considered as satisfied.

Where a
thing en-
gaged to be
done by a
husband for
the benefit
of his wife
will be con-
sidered as
satisfied.

One rule applicable to cases of satisfaction, though subject to some exceptions, is, that where a person is obliged to do a particular thing for the benefit of another, and he does a thing equally satisfactory, the intent being answered,

^s Shudal v. Jekyll, 2 Atk. 516.; Powel v. Cleaver, 2 Bro. C. C. 517.; 18 Ves. 152. 154.

^t See 2 Bro. C. C. 517. in Powel v. Cleaver; and see Monck v. Lord Monck, 1 Ball & Beat. 298.

^u See Wetherby v. Dixon, Coop. 279.

^v See 7 Ves. 515. in Trimmer v. Bayne.

^w See 18 Ves. 148. in ex parte Pye and Dubost.

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Satisfaction is founded upon intention.

Presumption of satisfaction stronger in case of a deed than a will.

Cases involving the doctrine; usually arise upon wills.

Assimilation of doctrine to election.

Cases illustrative of the doctrine.

a court of equity will presume a satisfaction by implication.¹ Satisfaction therefore is founded upon intention; it is something different from the thing to be satisfied, and substituted for it; and the question which always arises is, whether the thing done was intended as a substitute for the thing which there was an obligation to satisfy; a question entirely of intent; and which way soever the intent is, that way it must be taken.² Consequently no certain rule can be laid down, but each case must depend upon its particular circumstances. And it seems that upon questions of satisfaction, there is no difference between a deed and a will, except that the presumption of satisfaction is stronger in the former than in the latter case, where a bounty is supposed to be intended.³ But cases involving the doctrine usually arise upon wills, for want of an intention expressed by the testator, whether some interest bequeathed to another was intended to go in satisfaction of something which the testator was under a prior obligation to provide. And they assimilate themselves to election in this, that the person to be satisfied may elect to abide either by the instrument under which he derives title to the thing intended to be satisfied, or by the instrument through which it is intended satisfaction should be made.

In illustration of the present inquiry it may be stated, that where by marriage articles the husband covenanted to secure to his wife if she survived him the value of half her fortune, but never altered the securities upon which her fortune was invested; and by will gave her more than he was obliged to do by the articles; it was held she should not take both under the articles and will, but might elect to take one way or the other.⁴

¹ See 2 Atk. 654, in *Weyland v. Weyland*.

² See 1 Swanst. 219, in *Goldsmith v. Goldsmith*; *Weyland v. Weyland*, 2 Atk. 652; Ca. temp. Tals. 92, in *Lechmere v. Lechmere*; and see 3 Atk. 326.

³ See 2 Atk. 522, in *Wood v. Briant*.

⁴ *Corus v. Farmer*, 2 Eq. Ca. Ab. 34; pl. 1.; and see another example of satisfaction in the case of *Brown v. Dawson*, 2 Vern. 498; 1 Eq. Ca. Ab. 203, pl. 1.; *Prest Ch.* 240.

So where A., by articles on his marriage, agreed that his wife if she survived him should have 800*l.*; and having bequeathed to her 1,000*l.*, she claimed the same in addition to the 800*l.*: it was held, that she must either abide by the will or the articles, the former importing a disposition of the whole estate, and therefore implying a condition that she must accept what was there given in satisfaction of her demands.²

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considered
as between
husband
and wife.

And where upon marriage the husband conveyed long annuities in trust for himself for life, remainder for his wife for life, subject to a proviso that he and his wife, with the trustees' consent, might dispose of the annuities absolutely, and that she might upon his death disclaim the annuities, and enjoy such share of his personal estate as she would be entitled to in case he was a freeman of London at the time of his decease; and the husband afterwards sold the annuities without his wife's consent, and subsequently upon the marriage of his eldest son settled 5,000*l.* South Sea annuities upon himself for life, remainder upon his wife for life: the provision made for the wife by the second deed was held to be a satisfaction of her demand under the first, but subject to the election given to her by the latter. And the Lord Chancellor observed, that the husband having by his act become a debtor for the provision made by the first deed, it was the same as if he had been originally bound to make it; and that being so bound, he knew no case wherein the Court had not considered such subsequent settlement to be a satisfaction; and that he thought his being bound to do it by his own act was the same thing.³

2. In what cases a thing engaged to be done by a husband for the benefit of his wife will not be considered as satisfied.

In order to raise a case of satisfaction, the thing satisfying must be of the *same nature as and equally certain with* the thing to be satisfied; so that copyhold lands cannot go in satisfaction of freehold: and money and land being

Where a
thing en-
gaged to be
done by a
husband for
the benefit
of his wife
will not be
considered
as satisfied.

² Herne v. Herne, 2 Vern. 555.; ³ Weyland v. Weyland, 2 Atk. 1 Eq. Ca. Ab. 205. pl. 2. 632.

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considered
as between
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and wife.

Thing satisfying
must be of
same nature
as, and
equally cer-
tain with
thing to be
satisfied.
Difference
in any cir-
cumstance
will prevent
a satisfac-
tion, except
between
parent and
child.

things of a different kind, the one cannot be taken in satisfaction for the other, nor real for personal estate: neither can a term of years, nor goods, be taken in satisfaction for money.¹

And generally speaking, except only in cases between parents and children, when there is a difference in any circumstance between the thing to be satisfied and the thing satisfying, the latter shall not be deemed a satisfaction of the former. So that where upon marriage the husband gave a bond, conditioned to leave his wife 300*l.*, payable in a month after his decease; and afterwards bequeathed to her 500*l.* payable within six months after his decease, the bond debt was held not to be satisfied thereby; for the debt being payable in one month, and the legacy in six months, made a clear distinction, and repelled any presumption of an intention in the testator to pay the debt.²

And where A. entered into a bond, conditioned for payment of 500*l.* to trustees either in his lifetime, or immediately after his decease; upon trust to place the same out at interest, which was to be paid to himself for life, and after his decease to B. his wife, in case she survived him; and after the decease of the survivor, upon trust to pay the principal sum among the children, and in default of issue, to the survivor of said A. and B.: and the 500*l.* not having been paid, A. by his will, after directing payment of debts, bequeathed to trustees all his monies in the public funds, upon trust to pay thereout 1,000*l.* to his wife within six months next after his decease; and died without issue, leaving his wife surviving, to whom the 1,000*l.* was afterwards paid: on the question being raised whether the condition to pay the 500*l.* bond debt should not be con-

¹ Barret v. Beckford, 1 Ves. sen. 519.; and see Eastwood v. Vincke, 2 P. Wms. 613.; Chaplin v. Chaplin, 3 P. Wms. 245.; and see the Lord Chancellor's observations in Fowler v. Fowler, 3 P. Wms. 355.; see also Broughton v. Errington, 7 Bro. P. C. [8vo ed.] 461.; Richardson v. Elphinstone, 2 Ves. jun. 463.

² Haynes v. Mico, 1 Bro. C. C. 129.; and see 133. ibid. n. See also Devese v. Pontet, Prec. Ch. 240. n.; 1 Cox's Ch. C. 188.

sidered as satisfied by the 1,000*l.* legacy, it was held not to be so, because, among other reasons, the legacy was made payable six months after the husband's death, while the bond debt was payable in his life-time or immediately after his death, and the will contained a direction for payment of debts; and also because other persons, besides the wife, might have been interested in the bond debt.^t

And a case may be prevented from operating as one of satisfaction, upon the technical ground that a covenant is entire. For where a husband covenanted to pay trustee 6,000*l.* within three months after his decease, upon trust, in case his wife survived, and had no issue by him living at his death, as the event happened, to pay her 1,500*l.*, and invest the residue at interest, and pay the interest to her for life; and afterwards died intestate: the share of her husband's personal estate under the statute, which was much more than the provision under the covenant, was held to be no satisfaction or performance thereof, the Lord Chancellor observing, that it was not contended the interest of the 4,500*l.* should be taken as a satisfaction, and then the covenant was entire.^u Upon which case Lord Eldon has remarked,^v that he took the judgment to mean the covenant was entire; and that therefore if the 4,500*l.*, not given absolutely, could not be considered satisfied out of the distributive share, neither could the 1,500*l.*^w

Cases also may arise, which, though at first appearing open to an application of the doctrine of satisfaction, yet on a closer inspection prove not to be within it, an intention being wanting for that purpose.^x

3. As to the distinction between cases of satisfaction and those of performance, and in what cases the covenant of a husband for the benefit of his wife will be considered as performed.

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considered
as between
husband
and wife.

Case may
be prevent-
ed operat-
ing as one
of satisfac-
tion, upon
ground of
a covenant
being en-
tire.

Distinction
between
cases of sa-
tisfaction
and per-
formance.

^t Adams v. Lavender, 1 McClel. & Yo. 41.

^u See Perry v. Perry, 2 Vern.

505.; 1 Eq.Ca.Ab. 203. pl. 4.; Prime

^v Conch v. Stratton, 4 Ves. 391.

v. Stebbing, 2 Ves. sen. 409.

^w See 10 Ves. 15. in Garthshore v. Chalie.

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 considered
 as between
 husband
 and wife.*

Cases of
 performance
 involve no
 election.

Rules as to
 cases of
 performance.

In order to obtain a correct view of the doctrine of satisfaction, it is necessary clearly to discriminate it from the doctrine of performance, especially since the cases upon each subject are usually found under the same classification.

Upon cases of satisfaction the question, as already stated, is, whether the thing done was intended as a substitute for the thing which there was an obligation to satisfy; but with reference to cases of performance the question is, whether the identical act contracted to be done has been done.^x For where a man covenants to do an act, and he does an act which may be converted to a completion of this covenant, it shall be supposed that he meant to complete it.^y It is obvious therefore that cases of performance do not involve any election or choice, as some cases of satisfaction do: still however it will be proper shortly to refer to the cases of the former character, on account of their close assimilation to those of the latter.

One rule as to performance is, that if one covenant to do an act which is not done, but the covenantor suffers property to go so as to produce the same effect, that is held to be a satisfaction of the covenant.^z

Another rule is, that if the distributive share of a widow in her husband's personal estate, in case of his absolute intestacy, is equal to, or exceeds in amount a fixed sum which the husband had covenanted she should receive at his death, the covenant will be considered as performed.

Therefore where by marriage articles the husband covenanted with the wife's trustees, that in case she survived, his executors, within three months after his decease, should pay her 620*l.*; and on dying intestate and without issue she became entitled to a moiety of his personal estate, which amounted to more than the 620*l.*; such moiety was

^x See 1 Swanst. 919, in Goldsmid v. Goldsmid; Wathen v. Smith, 4 Mad. 325.

^y See 1 Bro. C. C. 583. n. (3). [5th ed.]

^z See 2 Ves. jun. 556. in Wilson

v. Piggot; and see Tooke v. Hastings, 2 Vern. 97.; Wilcocke v. Wilcocke, ibid. 558.; 1 Eq. Ca. Ab. 26.

pl. 5.; 3 P. Wms. 225.; Davys v. Howard, 6 Bro. P. C. [8vo. ed.]

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decreed to go in satisfaction of the covenant.^a Which case, and that of *Lee v. Cox* and *D'Aranda*, are authorities, that where a husband covenants to leave or pay at his death a sum of money to a person, who independent of that engagement by the relation between them, and the provision of the law attaching upon it, will take a provision, the covenant is to be construed with reference to that; and the court will not look upon the slight difference between leaving and paying, nor whether payment is to be within three or six months.^b

4. In what cases the covenant of a husband for the benefit of his wife will not be considered as performed.

But although a covenant may be performed by a portion of the residue in case of an absolute or partial intestacy, yet in case of a testacy a covenant will not be performed by an aliquot part of the residue.^c

And a case may be prevented from operating either as one of performance or satisfaction, by reason of the variance between the thing to be performed or satisfied, and the thing performing or satisfying.

Thus where by marriage articles the husband covenanted to pay his wife if she survived him an annuity of 200*l.* for life, and also an annuity of 50*l.* to provide a house with; and by will devised to her a house and furniture for life, and gave the residue of his estate to trustees, upon trust to invest the same in stock, and permit his wife to receive an annuity of 100*l.* thereout for life, payable half-yearly; and

^a *Blandy v. Widmore*, 1 P. Wms. 324. [4th ed.]; 2 Vern. 709.; and see *Lee v. Cox*. and *D'Aranda*, 3 Atk. 419.; *Kirkman v. Kirkman*, 2 Bro. C. C. 95.

^b See 10 Ves. 13. in *Garthshore v. Chalie*; and see *Goldsmid v. Goldsmid*, 1 Swanst. 211.; the latter of which cases proves, that a covenant may be performed by a share taken under a quasi intestacy. Lord Thurlow C. has said, that the cases under the statute of distribution were determined in analogy to the rule of law as to lands

descending in performance of a real covenant; see 1 Bro. C. C. 151. And upon the cases of *Blandy v. Widmore*, and *Lee v. Cox* and *D'Aranda*, Lord Eldon has remarked, that it was not the intention of Lord Thurlow in *Kirkman v. Kirkman*, 2 Bro. C. C. 95. 100., nor of Lord Kenyon in *Devese v. Pontet*, Prec. Ch. 240. n., to shake them, and that they were unshaken.

^c *Devese v. Pontet*, Prec. Ch. 240. n.; 1 Cox's Ch. C. 188.

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and wife.

Where co-
venant by
husband for
benefit of
his wife
will not be
considered
as perform-
ed.

Variance
between
thing per-
forming
and thing
to be per-
formed may
prevent
case of sa-
tisfaction.

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Cases of performance turn upon head of intention.

Partial performance will be presumed.

Satisfaction as between strangers.

Analogy to election.

the house devised to the wife exceeded the annual value of 100*l.*: the case was held to be neither one of performance nor satisfaction.^d

Cases of performance also ultimately turn upon the head of intention; for if a man has done that which is apparently tantamount to what he covenanted to do, yet if he did not intend it as equivalent or in performance, it would be idle for the Court to say he meant it as such.^e

And although a partial satisfaction will not be presumed, except as between parent and child, unless the intention of the party satisfying be expressed, or appear so to consider it; yet a partial performance will be presumed, since it may be concluded that the party under an obligation to perform intended afterwards to complete the performance.

Therefore if a person, bound by covenant to lay out a specific sum in the purchase of land which is directed to be settled, afterwards lay out part of the money, and at his death suffer the land purchased to descend; the covenant will be considered as satisfied pro tanto: for it cannot be intended that the money was obliged to be laid out altogether, and it may be doubtful whether one entire purchase could be met with for just the exact sum.^f

III. Satisfaction considered as between strangers; wherein it may be inquired, in what cases benefits, voluntarily acquired by persons from those upon whom they have any unsatisfied claims, will and will not be considered as a satisfaction thereof.

In the term "Strangers" are meant to be embraced all persons except parents, or persons placing themselves in loco parentum.

Cases of satisfaction falling within the scope of the present inquiry may be considered to bear some analogy to

^d Richardson v. Elphinstone, Ab. 293.; Sowden v. Sowden, 3 P. 2 Ves. jun. 463.; and see Hooke v. Grove, 2 Eq. Ca. Ab. 218, 219.

^e See 2 Bro. C. C. 395.

^f Lechmere v. Earl of Carlisle, 3 P. Wms. 211.; Ca. temp. Talb. 80.; and see Wilks v. Wilks, 5 Vin.

Ab. 298. n. (1) [4th ed.]; 1 Bro. C. C. 582.; 1 Cox's Ch. C. 165.;

Deacon v. Smith, 3 Atk. 323.; Attorney General v. Whorwood, 1 Ves. sen. 554. 546.

the doctrine of election, in respect of the competency there is to persons to elect between the claim to be satisfied, and the subject satisfying.

The greater majority of cases upon the point in question has arisen upon the satisfaction of debts by legacies: and herein the established rule has long been laid down to be, that if a debtor bequeath a plain general legacy to his creditor, equal to or greater than a debt contracted in the testator's lifetime, it will be presumed that he intended such legacy to go in satisfaction of the debt.^s And if one grants an annuity to another, and afterwards by will gives him a better annuity, this case falls within the rule of satisfaction; though it seems that if two annuities be granted, and an annuity equal to one of them be afterwards bequeathed to the grantee, the same will not be a satisfaction for either.^t But the foregoing rule has been frequently spoken of with disapprobation, and the Court has always evinced an anxiety to lay hold on any minute circumstance whence it might infer, that the debtor did not intend the legacy to be taken as a satisfaction for the debt, but as accumulative thereto.^u

If therefore the legacy be less than the debt, or be not of the same nature therewith, or be upon condition^v: or if the legacy be less beneficial than the debt^w: or if the testator particularly direct that his debts should be paid^x:

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satisfaction
of debts by
legacies.

Cases
where no
satisfaction
will take
place.

^s Chancery ca. 1 P. Wms. 408.; Cuthbert v. Peacock, Salk. 155.; 1 Eq. Ca. Ab. 204. pl. 8.; Talbot v. Duke of Shrewsbury, Prec. Ch. 394.; Eastwood v. Vincke, 2 P. Wms. 613.; and see the Lord Chancellor's observations in Fowler v. Fowler, 3 P. Wms. 553., whence it appears that the case of a wife forms no exception to the general rule. But this rule does not hold as to one legacy being a satisfaction for another; see 3 Ves. jun. 466. in Barclay v. Wainwright.

^b Graham v. Graham, 1 Ves. sen. 262.

ⁱ See 1 Ves. sen. 126. in Keech v. Kennegal; ibid. 520. in Barret v. Beckford; 2 Ves. sen. 636. in Mathews v. Mathews; 3 Ves. 529. in Hinchcliffe v. Hinchcliffe.

^j See Salk. 508. in Cranmer's ca.; Minuel v. Sarazine, Mosel. 295.; and see ibid. 8.

^k Atkinson v. Webb, 2 Vern. 478.; Prec. Ch. 236.; 1 Eq. Ca. Ab. 203. pl. 5.

^l Chancery's ca. sup.; Richardson v. Greese, 3 Atk. 65.

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or if there be an open and running account between two persons, so that it is unknown in whose favour the balance will turn; and he who afterwards proves to be the debtor bequeaths a legacy to the other^m: or if the debt be contracted subsequently to the bequest of the legacy, of whatever amount such legacy happen to beⁿ; or if the legacy depend for its enjoyment upon the happening of some contingency^o: or if the legacy be not *eiusdem generis* with the debt^p: or be directed not to be paid until a certain period after the testator's death^q: or if the legacy be bequeathed to the payee of a negotiable security^r: in none of these cases will it be presumed that a satisfaction was intended.

And the Court never carries the rule of satisfaction so far by construction, as to make it answer a double purpose. Therefore if a testator gives a pecuniary legacy to his executor, to whom he is also indebted in a sum less than the legacy, and makes no disposition of the surplus of his personal estate; though the legacy will prevent him from taking the undisposed of residue, yet it will be no satisfaction for the debt, since it may not operate for two purposes.^s

But in order to take a case out of the general rule, recourse is not to be had to particular circumstances of the legatee dehors the will, such as relationship, affection, services, &c., unless they are to be found in the will itself.^t It seems however that parol evidence is admissible to rebut

Parol evi-
dence ad-

^m See 1 P. Wms. 299. in Rawlins v. Powel.

ⁿ See 2 P. Wms. 343. in Thomas v. Bennet; Cranmer's ca. sup.; Fowler v. Fowler, 3 P. Wms. 353.; 1 Ves. sen. 324. in Mascal v. Mascal.

^o Crompton v. Sale, 2 P. Wms. 553.; 1 Eq. Ca. Ab. 205. pl. 9.; Prec. Ch. 394, 395. in Talbot v. Duke of Shrewsbury; Clark v. Sewell, 3 Atk. 96.; 2 Atk. 493. in Spinks v. Robins.

^p Masters v. Masters, 1 P. Wms.

421.; Barret v. Beckford, 1 Ves. sen. 519.; Jeacock v. Falkener, 1 Bro. C. C. 294.; Grave v. Earl of Salisbury, ibid. 424.; Deheze v. Mann, 2 ibid. 165. 519.; and see Robinson v. Whitley, 9 Ves. 577.

^q Nicholls v. Judson, 2 Atk. 500.; Clark v. Sewell, 3 Atk. 96.

^r Carr v. Eastabrooke, 3 Ves. 561.

^s See 1 Ves. sen. 637. in Mathews v. Mathews.

^t See 3 Atk. 68. in Richardson v. Greese.

the presumption of a legacy being intended to satisfy a debt.^u

As is the rule of presumed satisfaction in case of a will, so also is the rule if the subject of satisfaction be provided by deed: if it be absolute and certain, it shall go in satisfaction of the debt; but if it be uncertain and contingent, it can be no satisfaction.^v

Thus where A. made an absolute assignment of all his mortgages, bonds, bills, and other sums at interest to his natural daughter; but afterwards continued to treat the property as his own, and subsequently executed a bond to her, conditioned for payment of 10,000*l.* within three months after his death: it was held that she was not entitled to both the assignment and the bond, but must elect between them, the latter being intended to go in satisfaction of the former.^w

If however from expressions made use of in a deed, upon which a question of satisfaction is raised, it appears that a provision thereby made was not intended to go in satisfaction of a sum which the party from whom the deed proceeds was under a previous obligation to make good; the party benefited by the deed will also be entitled to the sum in respect of which he had an independent claim.

Thus, by a very recent case, where a daughter was entitled under her father's marriage settlement to a sum of 463*l.* 15*s.* 9*d.*; and the father died without the same being paid, having by his will appointed his son executor and residuary legatee; and the son shortly afterwards purchased various sums in the 3*l.* per cent. consols, amounting to above 4,000*l.*, which he settled in favour of his sister and her children; and it was recited that the settlement was made in consideration of the natural love and affection which he bore to her and her children, and for making

^u See Wallace v. Pomfret, 11 Ves. 542.

^v See Prec. Ch. 394, 395. in Talbot v. Duke of Shrewsbury.

^w Johnson v. Smith, 1 Ves. sen. 314.

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missible to
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sumption of
satisfaction.

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presumed
satisfaction
may apply
as well to a
deed as a
will;

but will be
equally
governed
by inten-
tion.

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some provision for them, and that the stock was purchased with his own monies: on a question being made after the brother's death whether or not the 46*l.* 15*s.* 9*d.* should be considered as satisfied, it was held not to be so, the Vice-Chancellor conceiving himself concluded by the recital from presuming that the brother meant to pay a debt due from his father's estate, and observing that the children had no immediate interest in the 46*l.* 15*s.* 9*d.**

* *Drewe v. Bidgood*, 2 Sim. & Stu. 424.

CHAP. VII.

**THE EQUITABLE DOCTRINE OF ELECTION CONSIDERED WITH
REFERENCE TO THE ABILITY OF PERSONS TO ELECT
BETWEEN MONEY AND LAND.**

THAT branch of the equitable doctrine of election which is now proposed to be considered is of a nature wholly different from the doctrine already discussed. It operates in cases where property is directed to be sold, and the persons, to whom the money to be produced by the sale, or the surplus thereof on the satisfaction of the purposes for which the sale is directed, is to be paid, are to become absolutely entitled to the same: or where money, either in its natural state, or to arise from the sale of property, is directed to be laid out in land, and the persons, to whom the same when purchased is directed to be limited, are to take either absolute interests therein, or estates tail only. In these cases the persons who are to become entitled to the money or land may elect to take the same either in its converted or unconverted state.

Statement
of doctrine.

An inquiry into the subject before us may be made under the following heads: —

I. Where an election may be made by persons, entitled to absolute interests in money or land, to take one or the other.

II. Where an election may be made by persons, to whom it is competent to acquire by means of a fine or recovery an absolute interest in land whereupon money is directed to be laid out, to take either the money or the land.

III. The commission of what acts by persons, entitled to elect between money and land, will be considered as indicative of an intention to take the one or the other.

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Where an
 election
 may be
 made be-
 tween mo-
 ney and
 land.

Where one
 may elect
 between
 land to be
 sold, money
 to arise
 from sale,
 and land to
 be pur-
 chased.

IV. The commission of what acts will not be considered as indicative of such an intention.

I. Where an election may be made by persons, entitled to absolute interests in money or land, to take one or the other.

When money is directed to be laid out in land, the fee-simple whereof when purchased is to be limited to one or more individuals; though there is no gift of the money, yet a court of equity will permit them to elect either to have the money paid over to them, or invested in land; for if they elect the former, it will be in vain to lay out the money in land, which they may the next moment convert into money.^a And though at law money articed to be laid out in land is considered barely as money till an actual investiture, yet equity views it in the light of real estate, and can therefore act upon it as its own creature.^b

So on the other hand, when land is directed to be sold, and the produce thereof paid to one or more individuals; though no interest in the land is expressly given to them, yet a similar election will arise.^c If there be other purposes also for which the land is to be sold, still they will be entitled to the surplus of the price as the equitable owners, subject to those purposes; and if they provide for them, they may keep the estate unsold.^d And if land is directed to be sold, and the produce to be laid out in other land, an election may be made between the land to be sold, the money to arise from the sale, and the land directed to be purchased.^e

Further, where land is directed to be sold, and the produce to be laid out in other land, which is to be limited to one in tail; he may in this case elect between either of these three subjects, namely, the land to be sold, the money to be laid out, and the land to be purchased: and by a fine

^a See 1 P. Wms. 131. 389.

dy; 17 Ves. 104. in Pearson v.

^b See 2 Atk. 454. in Oldham v.

Lane.

Hughes.

^d See 17 Ves. supra; M'Cleland

^c See 2 Atk. supra; 5 Atk. 447.

v. Shaw, 2 Scho. & Lef. 538.

in Trafford v. Boehm; 1 Ves. sen.

^e 17 Ves. 101.

175, 176. in Cunningham v. Moo-

levied of the land to be sold, where he is entitled to the immediate reversion in fee in the land to be purchased, he will acquire an absolute control over the former.

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Accordingly, where a copyhold estate was directed to be sold, and the monies arising from the sale were to be laid out in the purchase of freehold estate, to be limited to A. in tail, remainder to him in fee; he was considered the equitable owner of the copyhold estate, and the legal estate was directed to be surrendered to him.¹

Again, where A. conveyed a moiety of estates to trustees in trust to sell, and to apply part of the money arising from the sale upon certain trusts, and to lay out the residue in the purchase of other estates, to be limited to trustees for fifty years if A. so long lived, remainder to A. for life, remainder to trustees to preserve the contingent remainders, remainder to the first and other sons of A. by B. his wife in tail, remainder to their daughters as tenants in common in tail, remainder to A. in fee; and A. died leaving two daughters his only issue, and no sale was ever made; and C. and D., the husbands of the daughters, afterwards levied a fine of the moiety, to enure, as to one half part thereof, to the use of trustees, upon trust to convey the same to the uses declared by C.'s marriage settlement, and as to the other half part thereof, to convey the same to the uses declared by D.'s marriage settlement: so far as concerns our present purpose it was held, that upon principles of equity the daughters had the same extent of interest in the estates directed to be sold, as they would have had in the purchased estates if a purchase had been made, namely, an estate tail, with the immediate remainder to themselves in fee; and they might therefore elect between the estates directed to be sold, the money arising from such sale, (all charges for which the same was to be made being satisfied,) and the estates to be purchased therewith. And the Master of the Rolls observed, that supposing no fine had been levied, there would then have been ground to contend, that the

¹ Lord Gwyder v. Campbell, cited 17 Ves. 105. in Pearson v. Lane.

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Where a power of appointment over an estate directed to be sold will be available.

Concurrence of all parties necessary to restore to its original character property converted.

Where executors will be entitled to money directed to be laid out in land.

When money impressed with a real character will have a personal one, and when not.

trustees would have been compelled to convey to the daughters in fee, as they might have taken the money absolutely, instead of having it laid out:—that it might be questionable whether the trustees might themselves act upon this equitable doctrine, and take upon themselves to convey in fee to a person entitled to an estate tail only.^s

And if an estate is directed to be sold, and the money arising from the sale to be invested in the purchase of other estates, over which a general power of appointment is given, an appointment exercised over the original estate will be sustained in equity, as amounting substantially to the same thing.^t

When land is directed to be converted into money, it is in the option of the parties interested in the money to keep the land unsold either absolutely, or for any particular period.ⁱ But it seems that there must be a concurrence of all parties interested in order to restore to its natural character property which has undergone an equitable conversion^j: which point may frequently excite considerable circumspection in the investigation of titles.^k

And if persons, entitled to elect between money and land, show their intention, by the commission of certain acts, to have the money, and die before receiving the same, the Court will give it to their executors, and not to their heirs. Moreover, if a sum of money directed to be laid out in land come into the hands of one without any other use but for himself; or, in other words, if such person would be absolutely entitled to the land in case the money were laid out; there such money will have the character of personal estate, and cannot be claimed by the heir.^l But as between the heir and executor, when money has

^s Pearson v. Lane, 17 Ves. 101.

^t Standen v. Standen, 2 Ves. jun. 589.; Bullock v. Fladgate, 1 Ves. & Bea. 471.; Sug. Pow. 442.

ⁱ See 19 Ves. 592. in Walker v. Shore.

^j See 1 Bro. C. C. 500. in Fletcher v. Ashburner.

^k Sand. Us. & Tr. 303. [4th ed.]

^l See Chichester v. Bickerstaff, 2 Vern. 295.; 7 Bro. P. C. 555.; Pulteney v. Lord Darlington, 1 Bro.

C. C. 223.; 7 Bro. P. C. 530. {8vo. ed.]

been once impressed with real uses, it must be shown, in order to put an end to the impression, either that the money was in the possession of a person who had in himself both the heirs and executors, or he must do some act to denote a change of his intention as to the devolution of the property upon either.^m

So that if a person, having an election to take a sum of money agreed to be laid out in land as money, die without having done any act to determine the same, the person upon whom the land directed to be purchased therewith would devolve will be entitled to exercise such election, and not the personal representative of him to whom the right of election first accrued.ⁿ

Therefore where upon marriage the manor of K. was settled on the husband for life, remainder to the first and other sons in tail male, remainder to the husband in fee; and it was agreed that 10,000*l.*, part of the wife's fortune, should be laid out in the purchase of lands, to be settled in a similar manner; and there was issue of the marriage, one son, who upon his father's death levied a fine of the manor to the use of himself in fee, and soon afterwards died without issue and intestate, whereupon the manor descended to the plaintiff, who brought her bill against the son's administratrix to have the mortgage upon which the 10,000*l.* had been invested assigned to her; the same was ordered accordingly, the Court observing, that the son having had an election to make the 10,000*l.* money, it was necessary he did something to determine the same election, which not having been the case, then in a court of equity the heir was to be preferred to the administrator.^o

Although persons entitled to money directed to be laid out in land may, through the intervention of equity, elect to take it as personal estate, and it shall accordingly go as such to their representatives; yet if some of the parties

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On whom
the right of
election de-
volves.

Shares of
of persons

^m See 8 Ves. 235. in Wheldale v. Partridge.

^o Edwards v. Countess of Warwick, 2 P. Wms. 171.; 2 Bro. P. C.

ⁿ See 1 P. Wms. 174. in Lingen v. Sowray; ibid. 544. in Hayter v. Rod.

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 between
 money and
 land.*

*not sui
 juris in
 money to
 be laid out
 in land will
 be retained
 by court.*

*Feme-co-
 vert cannot
 alter nature
 of property
 converted,
 except by
 private ex-
 amination.*

*Lunatic
 cannot elect
 to take in*

entitled are not *sui juris*, but labour under an incapacity, the Court will retain their shares in its hands until the disability be removed.

Therefore where one devised that a sum of money should be laid out in the purchase of lands in fee, to be settled upon A. B. and C. and their heirs as tenants in common; on a bill brought by B. and C. and the infant heir of A., electing to have the money, the two thirds belonging to B. and C. were decreed to be paid to them; but the infant's share was directed to be brought before the Master, and put out for the infant's benefit, who by reason of his infancy was incapable of making an election; besides, his election might, were he to die during his infancy, be prejudicial to his heir.^p

And if one of the parties entitled to elect be a married woman, the disability of *coverture* will prevent her from altering the nature of the property by her bare deed or contract; and the money must either be invested in land, of which she may afterwards levy a fine, or by consenting on her private examination to take the money as personal estate, the same will be as much bound thereby as land would by a fine, and she may dispose of it to the husband or any one else.^q

But when land is directed to be converted into money to which a married woman is to become entitled, the same will belong to the husband in her right.^r The Court however will first inquire whether she has any settlement upon her.^s

Neither can a lunatic elect to take in its natural state property which has undergone an equitable conversion.^t

^p Seeley v. Jago, 1 P. Wms. 389.; and see Collingwood and Wallis, 1 Eq. Ca. Ab. 395.; Davers and Folkes, *ibid.* 396.; Earlam v. Saunders, Ambl. 242.; Car v. Ellison, 2 Bro. C. C. 56.; whence it appears that trustees cannot elect between money and land, unless the power of so doing is expressly given them. See also 19 Ves. 109., in Van v. Barnett.

^q See 2 Atk. 454., in Oldham v. Hughes; Pearson v. Brereton, 3 Atk. 71. And see stat. 7 G. 4. c. 45., *infra* page 525.

^r See 2 Atk. 455., in Oldham v. Hughes.

^s Binford v. Bawden, 1 Ves. jun. 512.

^t See Ashby v. Palmer, 1 Mer. 296.

II. Where an election may be made by persons, to whom it is competent to acquire by means of a fine or recovery an absolute interest in land whereupon money is directed to be laid out, to take either the money or the land.

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It had been long held previous to the statutable interpositions after noticed, that if money was directed to be laid out in the purchase of land, which was to be settled in such a manner as would enable the person to become entitled to a partial estate therein to acquire an absolute control over the same by levying a fine thereof; it would be competent to that person to exercise his election whether he would have the money paid to him in lieu of the land, or whether he would take such estate as was directed to be limited to him in the land, on the money being invested thereupon: for since by a common conveyance he might bar the entail, a court of equity would not put him to the circuity of having recourse to a legal bar: and it would be in vain for equity to decree a settlement, which at the same moment that it was made might be cut off.⁴

its natural state
property converted.

Where an
election
may be
made be-
tween mo-
ney and
land to be
limited in
tail, &c.

1. Where
the limit-
ation of the
land may
be barred
by fine.

As where by articles upon marriage a sum of 2,000*l.* was agreed to be invested in the purchase of lands, which were to be settled upon the husband and wife for their lives, with remainder to the heirs of the body of the wife by the husband, with remainder to the heirs of the husband; and there was afterwards issue of the marriage, one son and three daughters, and both the parents died without the money having been laid out: upon a bill brought by the son against one of his sisters as her father's administratrix, electing to have the money in lieu of the land, the same was decreed to him, the Court observing, that though a fine could not be levied of money agreed to be laid out in land to be settled in tail, yet a decree would bind such money equally as a fine would have bound the land if bought and settled.⁵

⁴ See 3 Atk. 447. in Trafford v. 150.; 2 Eq. Ca. Ab. 41. pl. 1.; ibid. Boehm; 1 P. Wms. 471. in Short 720. pl. 2. See also Short v. Wood, 1 P. Wms. 470.; 2 Eq. Ca.

⁵ Benson v. Benson, 1 P. Wms. Ab. 721. pl. 6.

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Lord Chancellor King in *Eyre's case*^w seems indeed to have departed from the above principle, and accordingly refused to order money directed to be laid out in land to be paid over to a person who would have had it in his power to acquire the absolute fee in the land when purchased by means of a fine; conceiving that a like regard should be had for the issue in tail as for the remainder-man: — but this decision does not seem to have been followed.

**2. Where
 the limit-
 ation of the
 land may
 be barred
 by recovery.**

Previously to the statute of 39. & 40. G. 3. c. 56.^x, (which has been recently repealed, and the enactments of which have been re-enacted by the next-mentioned statute,) if a person, to become entitled to an estate tail in land whereupon money was directed to be laid out, could not acquire an absolute control over the land when purchased except through the medium of a common recovery, the Court of Chancery would not permit such tenant in tail to elect between the money and the land, and on his application order the money to be paid over to him, but would require an actual investment of it in land, to be settled in the mode prescribed by the instrument directory of the limitations, so as not to deprive those in remainder, to whom the land when purchased was to be limited, of the chance they had of their remainders taking effect in possession, in case of an omission on the part of the tenant in tail to bar them in term-time, the only period during which a recovery could be suffered. The old rule indeed was, for the Court to decree payment of the money upon a bill filed by the tenant in tail, though a recovery was necessary to the acquiring of an absolute estate in the land^y; and so

^w 3 P. Wms. 15, 14.; and see note (G) [4th edit.], whence it appears, that if the party applying for the money were married, it would be expected that his wife should appear in Court, and give her consent thereto.

^x By 58. G. 3. c. 46. similar enactments to those contained in 39. & 40. G. 3. were made in application

to Ireland. It has been conjectured, that the case of *Pulteney v. Darlington*, 7 Bro. P. C. 530., and the many prior conflicting cases on the subject of money directed to be laid out in land, gave rise to the latter statute. See note pre-fixed to the above case.

^y See accord. 1 P. Wms. 90, 91, in *Legate v. Sewell*.

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the rule stood until the case of *Cowal v. Shadwell*^a, wherein the circumstance of the tenant in tail's death happening before a recovery suffered showed the interest of the remainder-man in so glaring a light, that it established the practice which prevailed until the passing the above statute.

The construction which this statute has received as to its mode of execution, in reference to cases where recoveries were previously necessary, may in part be considered a revival of the practice which prevailed before the case of *Cowal v. Shadwell*^a, so far as to render the actual suffering of a recovery unnecessary, and in part an adherence to the principle established by that case, so far as to suffer the same period to elapse between the date of the order made for payment of the money to the tenant in tail, and the time of his actually receiving the same, as would have been necessarily occupied in perfecting a common recovery, thereby giving the remainder-men the same chance they would have had in case a recovery had been actually suffered; for the practice has been, to order the money not to be paid to the tenant in tail, unless he was living on the second day of the then next term; and if the petition was presented in term-time, the Court would make no order for payment of the money in the same term, unless there would be sufficient time to suffer a recovery.^b

And under this statute it has been decided, that although a sum of money directed to be laid out in land to be limited to one in tail be subject to certain continuing charges, yet the Court will direct the same to be paid to the person who would be tenant in tail of the land when purchased, on such charges being provided for.^c

But the statute in question has been repealed by the recent statute of 7. G. 4. c. 45., whereby it is enacted, that

Statutable
enactments
as to money

^a Cited 1 P. Wms. 471. in *Short v. Wood*; ibid. 485. in *Chaplin v. Horner*; and see 1 Ves. sen. 176. in *Cunningham v. Moody*.

^a Supra.

^b *Lowton v. Lowton*, cited 5 Ves. 12. n. (a); *ex parte Bennet and Dolman*, 6 Ves. 116.; *ex parte Frith*, 8 Ves. 609.

^c See *in re Lord Somerville*, 2 Sim. & Stu. 470.

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to be in-
vested in
land, to be
limited in
tail, &c.

where money under the control of any court of equity, or of which trustees are possessed, shall be subject to be invested in freehold or copyhold hereditaments, to be settled in such manner that it would be competent, in case such money had been invested, for the person who would be tenant of any estate-tail therein, either alone or with the owner of any preceding estate, by deed fine or recovery in the case of freehold hereditaments, or by surrender and recovery in the case of copyhold hereditaments, to bar such estate-tail, and the rights of all persons in remainder, it shall not be necessary to have such money actually invested in order that such estate-tail and remainders may be so barred, but it shall be lawful for such Court, upon petition of the person who would be tenant of such estate-tail, and of the person, if any, whose concurrence would be necessary to enable the person who would be tenant of such estate-tail to bar the same, and the rights of all persons in remainder, such petitioners being adults, and where any of the parties is a feme covert, she being first separately examined and consenting, (except where the fund shall be less than 200*l.*,) in case such petition shall be presented by the person who would at the time of presenting the same be tenant in tail in possession of the hereditaments to be purchased, or shall be presented by the person who would at the time of presenting the same be tenant of the first estate-tail, with the consent of the person, if any, who would be owner of the antecedent particular estate, or entitled to any incumbrance antecedent to the estate of such tenant in tail, to order the money subject to such trusts to be paid to the petitioner, or applied as he shall appoint, and the Court approve of; and that in case such petition shall be presented by the person who would at the time of presenting the same be tenant in tail in possession of the hereditaments to be purchased, but such petition shall be presented without the concurrence of the persons, if any, who would be entitled to any incumbrance affecting the hereditaments to be purchased antecedently to the estate of such tenant in tail, or shall be

presented by the person who would at the time of presenting such petition be tenant of some estate-tail in the hereditaments so to be purchased, with the consent of the person, if any, whose concurrence would be necessary to enable the person who would be tenant of such estate-tail, in case the said hereditaments were purchased, to bar the said estate-tail, and the rights of all persons in remainder, but without the concurrence of the persons who would be entitled to particular estates in or incumbrances upon the said hereditaments antecedently to such estate-tail, to declare that such estate-tail, and all remainders and reversions expectant thereon, is and are absolutely barred, and to order that the hereditaments to be purchased with the money subjected to the said trusts shall, when purchased, be settled, (subject to the estates and interests antecedent to such estate-tail,) to the use of the person who would have been entitled to such estate-tail, his heirs and assigns; and that every such declaration shall be conclusive not only upon the person who would have been entitled to such estate-tail, but also upon all persons who could have claimed through such person by force only of such entail, or in remainder or reversion after such estate-tail.

It appears however, that persons entitled to take estates-tail in remainder in lands whereon money is directed to be laid out may, if under no disability, consent to the money being directly paid over to the first remainder-man in tail; and that this may be done without the sanction of a court of equity, and will be conclusive upon the issue of such remainder-men⁴: but that if any of the parties interested be incapacitated by coverture from giving a binding consent, then that such consent must be communicated by private examination.⁵

III. The commission of what acts by persons, entitled to elect between money and land, will be considered as indicative of an intention to take the one or the other.

⁴ See Collet v. Collet, 1 Atk. 11.; ⁵ See 3 Atk. 447, 448. in Traf-

Trafford v. Boehm, 3 Atk. 440. ford v. Boehm.

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Persons
entitled to
remote re-
mainders in
lands to be
purchased
may con-
sent to mo-
ney being
paid to first
remainder-
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What acts
will be con-
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election be-

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Various are the acts capable of being done by persons having an election to exercise between money and land, which will be sufficiently demonstrative of an intention on their parts to determine such election one way or the other. The point does not well admit of the application of any general rules, and each case wherein the question agitated is, whether certain acts done amount to an election, must depend upon its own peculiar circumstances.

If a person having the power of electing to take money agreed to be laid out in land as money, and which is put out upon security; calls in the same, and again invests it on security, which is mentioned to be for him, his executors and administrators; such a dealing with the money will withdraw from it the character of real estate.

Thus, where by articles upon marriage the husband agreed to add 700*l.* to the wife's portion, being a like sum, and the securities for the same were assigned to trustees, and agreed to be invested in land, to be settled on the husband for life, remainder to the wife for life, remainder to the first and other sons of the marriage in tail, remainder to the daughters in tail, remainder to the right heirs of the husband; and some of the trust-monies were afterwards called in and put out upon other securities, which were mentioned to be in trust for the husband his executors and administrators; and the husband died without there having been any issue of the marriage: Lord Harcourt held, that such part of the money as was called in, and placed out on securities on a different trust, should be taken as personal estate, for that there being no issue of the marriage, it was in the power of the husband to alter and dispose of the money as against the heir at law, though not against the wife; and that the placing it out upon different trusts made an alteration in the nature of it, since the husband's declaring the trust to his executors and administrators seemed tantamount to his having declared it should not go to his heir.¹

¹ Lingen v. Sowray, 1 P. Wms. 172.; Prec. Ch. 400.; 1 Eq. Ca. Ab. 175. pl. 5.; Gilb. Ca. Eq. 91.

Again, where by marriage-articles the husband covenanted with trustees to lay out 2,000*l.* in the purchase of lands, to be settled upon himself for life, remainder to the wife for life, remainder to trustees and their heirs, upon trust to sell, the monies arising from the sale to be divided among the children of the marriage, the sons' shares to be paid at twenty-one, and the daughters' at twenty-one on marriage; with a proviso that no sale should be made until one of the shares became payable; and that if all the children died before any portions became payable, the estate should not be sold, but after the decease of such children the trustees should stand seised of the same in trust for the husband and wife and the survivor in fee; and part of the money was laid out in the husband's lifetime, and part after his decease; and the only surviving daughter of the marriage died a feme sole and intestate: — on a question being raised between the administratrix of the daughter and her heir at law, whether the purchased property was to be considered as real or personal estate, it appeared that the daughter in her mother's lifetime, and being then of age, made a lease of part of the purchased lands at two different periods, reserving a rent to herself her heirs and assigns; and covenanted on the part of herself her heirs and assigns to perform the several intents and purposes of the lease; and on her mother's death received the rents, and made no application to the trustees to sell, nor brought a bill against them for that purpose: and it was determined, that the acts done by the daughter sufficiently indicated an election on her part to take the property purchased as real estate. And the Lord Chancellor was of opinion, that the daughter had a right to elect in her mother's life, and might during that period have compelled the trustees to sell the reversion for her benefit. And he observed, that though the daughter could not do otherwise than reserve the rent to herself her heirs and assigns, yet there was equal reason in the present case to hold it as her intent that the money should go to her heir, as in *Lingen*

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Chap. VII. v. *Sowray*^s to the executors; and that this would be sufficient to determine the question as between the representative of the personal estate and the heir.^b

Slightest intention will re-convert a realised fund.

In *Trafford v. Boehm*^c, the acts done by the plaintiff's husband were deemed sufficient to show an election between money and land in favour of the former: and it was laid down by Lord Thurlow in the judgment upon that case, that the slightest intention to take the money as money would make it so, and that the receiving it from trustees would there was no doubt be sufficient to show such an intention.^d And an election when once signified will be binding.^e

A realized fund may be re-converted by necessary inference.

Where a testator, to whom it was competent to take money which was invested in stock, and had received a real impression, and to which he was entitled in reversion either as money or land, bequeathed all the residue of his personal estate either in possession or *reversion* to his children; and it appeared that he was possessed of no personal estate in reversion except such stock: the circumstance that the word "reversion" could not be satisfied otherwise than by an application of it to the stock was held to indicate an intention on the part of the testator to treat the same as personal estate.^f

The levying a fine may constitute an election.

In the above cited case of *Pearson v. Latee*^g, the fine levied by the daughters and their husbands of the estates directed to be sold constituted an election to take such estates in their character of realty, and not the money to be produced by the sale thereof, or the estates to be purchased with such money.^h

A realized fund may be re-converted by

If a testator elect to pass a realized fund as personality, he may accomplish that object by his will, though unattested by three witnesses.ⁱ And Lord Macclesfield intimated

^s Supra, page 326.

^b *Crabtree v. Bramble*, 3 Atk.

680.

ⁱ 3 Atk. 440.

^j See 1 Bro. C. C. 226, 237, 238.

^k See Ambl. 229.

^l *Triquet v. Thornton*. 18 Ves. 345.

^m Supra, page 317.

ⁿ See further respecting the foregoing inquiry *Chaplin v. Horner*, 1 P. Wms. 483.

^o See 3 P. Wms. 222. n. [C]. [4th ed.] And money agreed to be laid

out in land may be devised as

an opinion, that a realized fund might be divested of that impression even by a parol direction to that effect.³ And there is a case which appears to have been decided upon the ground, that, as between the real and personal representatives of a testator, evidence of a parol declaration made by him that a realized fund should not be laid out in land might be read, and would be sufficient to divest it of its real character; though the Court observed, that if the evidence concerned the right of a third person, it should not be read.⁴ Yet Lord Hardwicke in a subsequent case is reported to have said, that though very slight evidence by acts done would be sufficient, he could not admit that a parol declaration would be so.⁵

IV. The commission of what acts by persons, entitled to elect between money and land, will not be considered as indicative of an intention to take the one or the other.

When property is considered in equity as having received an impression different from its natural one, and a question arises upon the will of a person competent to deal with the subject, whether he intended to pass the same under a denomination differing from that acquired by its converted estate; the onus of proving such an intention will lie upon him whose interest it is so to contend; and it is not enough to fix upon an ambiguous expression, or an equivocal direction.⁶ But in order to restore money or land which has undergone an equitable conversion to its original character, it is necessary that some act be done by a competent person, indicating an intention to re-convert the property.⁷ Therefore if no election is made between land and money by a person entitled to exercise the same, then the Court will call it the one or the other, according to the rule in equity that what is agreed to be done must be considered as done: for something is necessary to show

land; see accord. Shorer and Shorer, 10 Mod. 39.

³ See 2 P. Wms. 174.

⁴ Chaloner v. Butcher, cited 3 Atk. 685.

⁵ See Bradish v. Gee, Ambl. 229.

⁶ See Stead v. Newdigate, 2 Mer.

521. 531.

⁷ Kirkman v. Miles, 13 Ves. 358.

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will unat-
tested by
three wit-
nesses.

Whether by
parol direc-
tion, quare.

What acts
will not be
considered
an election
between
money and
land.

On whom
the onus of
proving an
intention to
re-convert
property
lies.

Some act
necessary
to restore
to its ori-
ginal char-
acter pro-
erty con-
verted.

Chap. VII. that what the Court calls land be considered as money, and what it calls money be considered as land.^a

The present inquiry is from its nature no more susceptible of the application of any general rules than the preceding one: the two under-mentioned cases principally exemplify the inability of feme covert to restore money impressed with a real character to its pristine personal one, except through the medium of private examination.

Feme covert cannot alter character of money to be laid out in land by bare contract or deed.

The first case proves, that since money articed to be laid out in land is to be considered as real estate, if the person entitled to the land when purchased is a feme-covert, she cannot alter the character of the money by her bare contract or deed.

Therefore where a husband by articles upon his marriage covenanted with trustees to lay out 20,000*l.* in land, to be settled upon himself for life, remainder to the intent his wife might receive an annuity for her life, remainder to his first and other sons in tail male, remainder to his own right heirs, and died without having laid out the money, and without issue, leaving A. the wife of B., and C., his heirs, and also next of kin, between whom and the intestate's widow, being the only persons entitled to his personal estate, articles of agreement were entered into, whereby it was agreed that 20,000*l.* South Sea annuities should be transferred to trustees, who should sell the same, and lay out the money in land, to be settled to the uses mentioned in the former articles; and A. afterwards died, whereby C. became entitled as her heir to all her real estate; but B. contended that the subsequent articles had turned the money which was realized by the former articles into personal estate again, whereupon he became entitled to his wife's share as her administrator: the Lord Chancellor, after ruling that as to one moiety of the South Sea annuities C. was entitled to it as co-heir to the deceased settlor, observed, that upon the other moiety arose the question whether the latter articles had re-converted the same into

^a See 3 Atk. 256. in *Guidot v. Guidot.*

personal estate; and he held them not to have had such effect, being of opinion, that the wife of B. was incapable of changing the nature of the estate, because of her being under coverture, and unable to contract; and that supposing her able to contract, the articles did not import any such change.^v

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Neither will payment to a feme-covert and her husband of money articed to be laid out in land, and to which she would be entitled when purchased, and a release from herself and husband for the money, be sufficient to change its real character.

For where by marriage-articles 500*l.* were agreed to be laid out in lands, to be limited to the husband for life, remainder to trustees to preserve the contingent remainders, remainder to the child or children of the marriage as the husband and wife or survivor should appoint, in default of appointment to be equally divided among the children, and if but one child, to him or her in tail, remainder to the husband in fee; and there was issue of the marriage one daughter, and no appointment was made in exercise of the power, and the 500*l.* were afterwards paid to the daughter and her husband, who received the same as money and gave a release for it, but upon recital of the articles:—on a bill brought by a daughter of the father's second marriage against the husband of the daughter of the first marriage as her representative, claiming the 500*l.* as land, the same was decreed to her, (subject to the life-interest therein of the husband of the daughter by the first marriage as tenant by the curtesy), upon the ground that the acts done were not sufficient to have the sum considered as money. And the Lord Chancellor observed, that the daughter being tenant in tail, with reversion in fee in one moiety, if she had been *sui juris*, and had brought a bill for the money, a moiety would have been decreed to be paid her, the other moiety to be put out at interest, to go as the profits of the land would; but that being a feme covert, although she had the

^v Oldham v. Hughes, 2 Atk. 452.

*Chap. VII. reversion in fee of the whole, the money should be laid out, unless upon private examination in court, or in the country upon an order in the nature of a dedimus potestatam, she declared her consent to have it in money, and then the Court would decree it so: but that the payment of the money, she not being *sui juris*, was not equal to a decree of the Court, nor was the release sufficient to cause the money to be taken otherwise than as land, not being equal to a fine, or sole and separate examination; nor could it change the equitable quality the money had gained of being considered as land.*

Where there will be no re-conversion of property by necessary inference.

Although in a case where it is competent to a testator to pass money which has been realized either in its natural or converted character, and he makes use of a term which cannot be satisfied otherwise than by applying it to the money, and passing it as such, an inference will thence be drawn that he intended to pass the money as personal estate^x; yet if there be any other subject to which such term can be properly applied, no such inference will arise, and the Court will not apply the term improperly.^y

It may in conclusion be observed, that if a person be entitled to an estate-tail in land, and a sum of money is directed to be laid out in land, which is to be settled upon the same uses as the land already in settlement; any act done by the tenant in tail, whereby he may acquire an absolute estate in the settled land, will not have the effect of removing from the money the impression of real estate.^z

^x Cunningham v. Moody, 1 Ves. sen. 174. ^y Biddulph v. Biddulph, 12 Ves.

^z See Triquet v. Thornton, 15 Ves. 345, and *supra*, page 328. ^{161.} ^z Edwards v. Countess of Warwick, 2 P. Wms. 171.

APPENDIX.

Note on the Doctrine of APPROBATE and REPROBATE in the Law of Scotland, analogous to that of ELECTION in the System of Equity in England.

CASES involving questions founded on the doctrine of approbate and reprobate having been occasionally brought before the Court of Appeal in this country, and the doctrine having received a detailed discussion in the recent case of *Ker v. Wauchope*¹, it may not be amiss to state shortly the principles of the doctrine, and some of the leading cases connected with it, under the following arrangement:

Doctrine of
approbate
and repro-
bate.

I. The principles upon which the doctrine of approbate and reprobate is founded.

II. In what cases the doctrine has application, and wherein it has been enforced.

III. In what cases the doctrine has no application.

IV. The principle of *compensation* resulting from an election to reprobate the instrument in reference to which the doctrine is applied.

I. The principles upon which the doctrine of approbate and reprobate is founded.

That which in the law of Scotland corresponds with the doctrine of election in our system of equity is termed "Approbate and Reprobate," it being equally settled in the law of Scotland, as it is with regard to instruments in England, that a person cannot derive benefit from one part of a deed, and at the same time deny effect to another part of it, nor separate two parts of a deed, and take benefit

Statement
of doctrine.

¹ 1 Bligh's P. C. 13. See Bell's Comm. on the Law of Scotland, vol. i. p. 146. [5th edit.]

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bate.*

Its origin.

**Has chiefly
arisen on
death-bed
disposi-
tions.**

**Reduction
of deed *ex
capite lecti.***

**Election
thereon.**

from that part which is in his favour, and at the same time avail himself of a right to challenge that part which is prejudicial to his interest; in other words, cannot both approve and reprobate the same deed. The doctrine itself stands upon a firm basis, having its foundation both in equity and reason, and is, in principle, immediately derivable from the civil law, being an obvious recognition and adoption of that maxim, whence our doctrine is supposed to have emanated ^b; “**ABSURDUM VIDETUR LICERE EIDEM, PARTIM COMPROBARE JUDICIUM DEFUNCTI, PARTIM EVERTERE.”^c**

The cases wherein the doctrine of approbate and reprobate has been enforced have arisen chiefly from deeds executed on death-bed.

It is laid down as a general rule by the institutional writers on the law of Scotland^d, that if a person by deed executed on death-bed spontaneously make a disposition affecting his heritable property, or his heirship moveables, in any degree prejudicial to the heir, and to which property or moveables the heir would have succeeded, or from which he would have derived some benefit had no such disposition been made; the deed will be capable of being reduced by the heir upon the ancestor's death, *ex capite lecti.*^e

But if by such deed any interest be given to the heir in the ancestor's moveable effects, and over which the ancestor had a right to exercise an absolute control; then the heir will not be permitted both to reduce the deed as to the heritable property, and to claim under it as to the moveable effects; but he will be compelled to elect to take either under or against the deed: if he elect to take under it, he must permit the dispositions made by it to take effect; and if he elect to take against it, he must give up all claim under it.^f

It has been observed in former pages, that according to

^a See *supra*, page 174.

^b 1. 7. ff. *de bonis libertorum.*

^c *Exak. Inst.* b. iii. tit. viii. § 95. et seq.; *Stair, passim.*

^d *Mor. Dict. Dec.* voce “Death-

^e bed.”

^f *Ibid.* voce “ Approbate and Reprobate.”

the doctrine of election as administered in the English courts of equity^s, if one take upon himself to dispose of the freehold estate of another by a will not complying with the ceremonies required by the statute of frauds^t, and bequeath a legacy to the person whose estate is assumed to be disposed of, without stating the enjoyment of the legacy to depend upon the condition of the legatee's permitting the will to take effect, no case of election will be raised, since, as regards the land, the will is absolutely void, and cannot be read.

But it is observable, that the principle upon which this proceeds does not by analogy afford a ground for destroying the doctrine of probate and reprobate in a case where heritable property is disposed of by a deed upon death-bed, and a legacy is bequeathed to the heir, since, according to the law of Scotland, such a deed is *not absolutely void*, (as in the case of a devise of freehold property in England, not conforming with the statute of frauds,) but, until reduced to a nullity, is *voidable only*, and capable therefore of being read for the purpose of ascertaining the intention of the testator, and will in many cases regulate the title, notwithstanding any objection the heir may raise against it.ⁱ

The doctrine of *probate* and *reprobate* may, in one of its effects, be said to lead to much the same result as the doctrine of *homologation*.^j A person on whom it is incumbent either to probate or reprobate an instrument may elect to do the one or the other; and if he die without having made any election, then it would seem that the heir as to heritable property, and the personal representative as to moveable effects, may exercise the right of election in the same manner as the ancestor or person represented might have done. If an election be made to reprobate the instrument, then as regards the person electing and those

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bate.

Death-bed
deed is
voidable
only.

Assimila-
tion of doc-
trine to that
of homolo-
gation.

Where
election
may be
made by re-
presentative
of person
put to elec-
tion.
Conse-
quences of
reprobating

^s See supra, pages 209, 210, 227. Bell considers the doctrine as a part of the general doctrine of

^t 29 C. 2. c. 3.

⁴ See 1 Bligh's P. C. 25.; Bell's homologation; see his Comm. vol. i. p. 146. [5th edit.]; and conc. Homologation, see *ibid.* 144.

ⁱ Ersk. Prin. 325, 326. [11th ed. 8vo. Edin. 1820.] Mr. Professor

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and appro-
bating an
instrument.

Election by
immediate
will con-
clude re-
mote heir.
Effect of
homologa-
tion.

Terms
“appro-
bate” and
“homolo-
gate” syno-
nymous.

To render
act of ap-
probate
or reproba-
tion con-
clusive, it
must have
been com-
mitted in
full know-
ledge of
rights.

What the
doctrine is
calculated
to accom-
plish.

claiming under him the instrument is completely a dead letter, and no claim whatever can be substantiated under it: but if on the other hand an election be made to approve the instrument, then as well the party electing, as those claiming under him, must allow the dispositions assumed to be made by the instrument to have their full effect; and an election made by the immediate heir will be conclusive upon every remote heir.

Now the proper effect of homologation is, “to cut off the person homologating from all objections otherwise competent to him against the original deed; and consequently to give the right the same effect against him and his heirs, as if it had been valid from the beginning^k;” therefore the terms “approbate” and “homologate” as applied to an instrument seem somewhat synonymous; and herein the connexion between the two doctrines appears to exist.

When an instrument shall be said to be reprobated, and when approved or homologated, and when neither the one thing nor the other can be predicated of it, must of course depend upon the circumstances applicable to each particular case wherein the doctrine may arise. In order however to render an act of approbation or reprobation conclusive upon a party, it must have been committed in full knowledge of the power he possessed to make an election either the one way or the other.^l So, “homologation cannot be inferred from the act of one, who was not in the knowledge of the original deed, homologation importing an approbation of that deed; and he who is ignorant of a deed cannot be said to approve of it.”^m

Through the medium of the doctrine of probate and reprobate, a person may, by a deed executed on death-bed, circuitously accomplish those objects which he cannot ac-

^k Ersk. Inst. b. iii. tit. iii. § 49.

^l Loudon’s case, infra, page 340.
The same principle also obtains in

the English doctrine; see accord.

supra, page 239.

— Ersk. Inst. ut supra; Mor. Dict. Dec. voce “Homologation.”

complish by direct means: and the doctrine may probably be brought into operation in many cases of family arrangement both with justice and propriety, as affording the means of enabling a person to make that equitable disposition of his property among his children or others having claims upon him, which without its operation he could not so effectually enforce.

II. In what cases the doctrine of probate and reprobate has application, and wherein it has been enforced.

" Where a deed was conceived partly in one's favour, " and partly subjecting him to burdens, it was usual for " the person concerned, if he was advised to do any appro- " batory act, before he resolved to homologate it *in totum*, " to protest that what he did might *not* be deemed *an act* " *of homologation*. After such protestation, the act to " which it is interposed is not construed as a total appro- " bation of the original deed; July 12. 1671. Murray; and " the Court of Session have, in several instances, sustained " *partial* approbatory acts as acts of *total* homologation " where this caution was omitted; 19. Feb. 1663. Muir; " 28. June 1671. Hume;" Ersk. Inst. B. iii. tit. iii. § 49. " But where the person so protesting is not entitled to do " the act, or take the benefit which he contemplates, with- " out undertaking as a condition of it the obligations im- " posed by the deed, the protest will have no effect in dis- " charging such obligations."

One of the earliest cases upon which the doctrine was directly brought to bear appears to be that of *Paterson v. Spread*, whence this principle seems deducible; that if one execute a settlement on death-bed of all his heritable and moveable property in favour of his heir, but giving some third person a sum secured by adjudication over certain heritable property upon the occurrence of some contingent event, and which afterwards happening, the right

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bate.

Where doc-
trine has
application.

Election on
death-bed
settlement.

^a See Bell's Comm. vol. i. p. Dict. Dec. 3333. 3335.; and see 146. [5th ed.] Bell's Comm. vol. i. p. 150. and n.
Reported by Lord Kames, and 4. [5th ed.]
by Kilkerran and Falconer, Mor.

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**Heir put to
election.**

to the adjudication becomes effectual, the heir will not be permitted to reduce the settlement on the head of death-bed, and to claim the moveable property under the same settlement.

In the case to which reference is made, A. executed a settlement on death-bed of his whole heritable and moveable estate in favour of his wife in life-rent, and of his two daughters equally in fee; and provided that in case of his younger daughter's decease before majority or marriage, her mother should have at her own disposal the sum of 1000*l.* Scots, secured by adjudication upon a certain estate named in the deed. On the younger daughter's decease, her sister brought a reduction *ex capite letti* of the faculty given to the wife to dispose of the sum secured by adjudication: and it was found by the Court of Session, that "there being moveable subjects which the defunct was at liberty to dispose of, far above the adjudication in question, conveyed by the disposition to the heir, the disposition, was not in prejudice of the heir, and therefore she could not quarrel the same on the head of death-bed." ^p

**Election by
heir be-
tween free-
hold pro-
perty in
parts sub-
ject to Eng-
lish law,**

This case has been variously reported; by Lord Kames, (Fol. Dict. vol. iii. p. 171.; Rem. Dec. vol. ii. No. 73. p. 114.) by Lord Kilkerran, and Falconer. The principle of approbate and reprobate has not been particularly adverted to either by Kames or Falconer, the former of whom concludes with the following observation:—"This judgment might be right, had not the heir been also next of kin. But to bar a challenge of death-bed, it certainly would not be sufficient to say, that the heir, being also next of kin, is in possession of the moveable estate, as well as of that which is heritable. Now this, in effect, is the present case. It cannot be thought that

"the heirs were any way benefited by being disponees to the moveables, when they would have succeeded to the moveables though no disposition had been granted." "The law of death-bed," (says Kilkerran,) "though it may proceed on the presumption of incapacity, only restrains deeds in prejudice of the heir, who therefore cannot take by a deed, and at the same time reprobate a part of the same deed." The attention of the reader is directed to Lord Kilkerran's Report of this case, which will be found in Mor. Dict. Dec. 3334-5., and in the separate vol. of reports published by his Lordship, *voce* Death-bed, No. 5. p. 153.

son and by the same instrument devise freehold property in England, or in parts subject to the English law, in favour of the heir, (such instrument being executed in the manner required by the law of England for the disposition of freehold property,) the heir will not be permitted both to reduce the disposition so far as the same affects the heritable property, and also to claim the property devised to him, but he must make an election.

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and herita-
ble property
in Scotland.

Thus, where a person possessing an estate in the island of St. Christopher, and another in Scotland, by a death-bed disposition bequeathed the former estate to trustees for the use of his son, and by a separate clause bequeathed the latter estate to his wife for life, and after her death to his daughter: — in a process of multiple-poinding brought by the tenants, the relict claimed her estate conform to the instrument; and it was pleaded for the son, that the legacy was void, inasmuch as the estate could not by the Scotch law be conveyed by a testamentary deed: to which it was answered by the relict, that the disposition having been found valid by the law of England to convey the estate in St. Christopher in favour of the son, he was thereby barred from challenging the settlement made in the same disposition of the Scotch estate. And the Lords accordingly found, that the son could not quarrel the conveyance by legacy of the Scotch estate, and preferred the relict.⁴

The doctrine of probbate and reprobate seems also to have been applied against legatees by the Scotch Courts upon a principle analogous to that in which the corresponding doctrine has been applied by the English Courts of Equity, namely, that if a specific thing belonging to a legatee be given to another, the legatee cannot hold both that and his legacy, but must give up the one or the other.⁵

Where le-
gatee must
elect be-
tween lega-
cy and a
specific
thing be-
longing to
him.

Thus, we meet with a decision to the effect, that where

⁴ Cunningham v. Gainer, Mor. See also Gibson v. Macbean, Mor. Dict. Dec. 617.; 1 Bligh's P. C. 40. Dict. Dec. 620.

⁵ See supra, p. 220.

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one assigned a bond to another, and afterwards by his will left the bond to a third person as a special legacy, and appointed the assignee his executor and universal legatar, it was found, that the executor could not quarrel the special legacy, nor seek to be preferred in virtue of his assignation, unless he would renounce any benefit he could have by the testament.*

Again, where a special legacy of an heritable bond was left by a testament, in which the testator's heir was named executor and universal legatar, the legacy was sustained, since it implied a *non repugnantia* upon the heir, so that he could not quarrel the special legacy, and at the same time take the benefit of the testament.[†]

So by a very recent adjudication in an English Court of Equity it was decided, that if the property of a testator in part consists of money secured by an heritable bond in the Scotch form, and charging lands in Scotland; and he by will assumes to make a distribution of all his property, including the bond debt, among his children; the heir must elect to take either under or against the will.[‡]

**Act of ho-
mologation
infers
knowledge
of instru-
ment ho-
mologated.**

**Court may
prescribe
period for
an election
being made.**

The next cited case, besides exemplifying the doctrine of approbate and reprobate, also proves, that where a person has an election to exercise, he will not be considered as having homologated, or elected to take under the instrument upon which the question arises, unless the acts of homologation imputed to him were done with a full knowledge of the contents of such instrument;[§] and that the Court will prescribe a certain definite period within which an election must be made.[¶]

The case referred to was as follows:—A. being resident in Jamaica, had, some time previous to his death

* Falconer v. Dougal, Kames's Dict. Dec. vol. ii. p. 309.

† Cranston v. Brown, ibid.; Mor. Dict. Dec. pp. 8058-60.

‡ See accord. Reynolds v. Torin, Russ. 129. This decision was pronounced by the late Lord Gifford.

§ Such is also the doctrine in England; see accord. supra, pp. 239, 244, 267.

¶ So may an English Court of Equity; see accord. supra, page 241.

there, sent home 2,000*l.*, 1,000*l.* of which was lent upon heritable security. He executed a will in the English form, whereby he directed his executors, when his nephew B. attained 21, to invest 5,000*l.* in security on property in Great Britain for B.'s use during life, and after his death for the use of the heirs of his body; and directed that the 2,000*l.* he had remitted should be applied in part payment of the 5,000*l.*: and he further directed his executors to invest 1,500*l.* on security, the interest to be paid to the testator's brother C., (who was his heir at law,) for life, and after his death the principal to go to his children. C. received the interest of the 1,500*l.* for several years; but having obtained information of the heritable bond for 1,000*l.*, he contended that the same did not pass by A.'s will, but fell to him as heir; which claim B. met by the doctrine of probate and reprobate, insisting that C. had homologated the will, by taking benefits under it in having received the interest of the 1,500*l.* Whereupon it was found by Lord Newton Ordinary, that C. had not done any thing sufficient to infer homologation, unless it could have been established that he had full knowledge of the contents of the will when the alleged acts of homologation were done:^x and it was also found, that C. was not entitled both to approve the will by accepting the bequest of the interest of the 1,500*l.*, and to reprobate it by challenging the conveyance of the 1,000*l.*: and he was ordained to declare his option within ten days, whether he would take the interest of the 1,500*l.*, or claim the 1,000*l.* lent on heritable security, but destined to answer the purposes of the will.^y

If one execute a deed of disposition upon death-bed of all his unentailed heritable property and all his moveable effects, and thereby give a partial interest therein to his heir at law; and if upon the ancestor's decease the heir reduce the deed on the head of death-bed so far as relates

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bate.*

A party
cannot both
approve
and repro-
bate same
instrument.

Election by
heir be-
tween un-
entailed
heritable
property
and move-
able effects.

* See Johnstone v. Paterson, 4 printed case of the Respondents Shaw & Dunl. 234. in Ker v. Wauchope, p. 4.; 1 , Loudon's case, stated in the Bligh's P. C. 12.

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exists be disposed of by another, the doctrine will not apply; because, according to Erskine, ‘one may avail himself of a deed in his own favour, and at the same time object against another tortious deed granted by the same party, which he had no power to grant, and which tends to cut the grantee of the first deed out of some just right.’ The grantee does not in such case approbate and reprobate the same deed; he homologates that of which he claims the benefit with all its qualities, and only objects against a separate deed which it was not lawful for the grantor to execute, and which, were it sustained, would wrongfully deprive him of a legal right otherwise competent to him.^c This distinction, however nice it may appear, seems nevertheless to be established by decided cases, and has been carried so far as to deny an application of the doctrine, even though the instruments refer to each other, and aim at the accomplishment of one common purpose. An instance of this we have in a case where one made a will of his personal estate in favour of his heir at law, and a few days after executed an entail of his landed property also in favour of his heir, but laying him under certain restrictions. The heir took the personal estate under the will, and afterwards challenged the deed of entail as executed on death-bed: and although it was contended that he could not approbate and reprobate the same deed, and that the will and entail referring to each other, and being executed *unico contextu*, were to be considered in that light; yet it was decided, that notwithstanding his having taken the personal estate under the will, he might set aside the separate deed of entail.^d

And if one make an entail of heritable property in

^c See Ersk. Inst. B. iii. tit. 3. s. 49.

^d Gordon's case, stated in the printed case of the Appellants in Ker v. Wauchope, p. 4., and in 1 Bligh's P. C. 9. But quære this doctrine, and see Countess of Strathmore v. Marquis of Clydes-

dale, 20 Feb. 1729., 1 Mor. Dict. Dec. 427.; Turnbull v. Turnbull, 21 Feb. 1776., 5 Brown's Sup. to Mor. Dict. Dec. 380. See also Bell's Comm. vol. i. p. 149. [5th ed.]; and see Kirkham v. Smith, supra, p. 269.

Scotland, but the deed, by reason of its not being executed in the manner required by the law of that country, is void; and by his will executed at the same time as the deed, and in proper form, leave his personal estate to be disposed of in a particular manner: — a person entitled to some interest under both instruments, and those claiming under him, may reprobate the former instrument, and at the same time approbate the latter.

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bate.

This appears from the case of *Wilson v. Henderson*,^c where a person made an entail of an estate in Scotland, but executed the same in a manner which rendered it a nullity by the law of that country, and by his will made at the same time in due form left his personal estate to be laid out in land, to be entailed in like manner; and one question being, whether the heirs of a person who took some benefit under the will and entail could challenge the latter by reason of its informality; although it was decided by the Court in Scotland that such person having taken benefits from both deeds could not both approbate and reprobate, and that his heirs must be equally bound, yet this decision was afterwards reversed on an appeal to the House of Lords.

If a deed assume to dispose of the heritable property of another, or property to which he can substantiate a claim, but the same is absolutely *void*, (either for want of power in the party dispossessing, or of the requisite solemnities,) and not *voidable* only; and some free disposable property belonging to the donor, and capable of being passed by such deed, be thereby given to the owner of the heritable property, but no express condition be annexed to such gift, to the effect that its enjoyment shall depend upon the terms only of the donee's giving stability to the disposition assumed to be made of the heritable property; no election between the two subjects will in this case be raised: but if a condition of such a nature be inserted, then an election must be made, even though the case be

Where an
election will
be raised by
a gift with
express
condition,
and where
not.

^c See the Appellants' case in *Ker v. Wauchope*, p. 4.

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promoted by an infant, provided he be capable of disposing of the free property^f.

So by the English law, a devisee will not be put to election where his freehold estate is assumed to be disposed of by a will not competent to pass the same for want of due solemnities, and a plain legacy is bequeathed to him; otherwise it is, where the legacy is accompanied with a condition that the legatee permit the will to have effect.^g

An unsuccessful attempt has been made to apply the doctrine of probate and reprobate to a case, where A., having two estates in Scotland, executed a settlement thereof in favour of himself in life, and to B. and others in fee, and reserved a power to alter this settlement at any time of his life, *et etiam in articulo mortis*; and about 22 years after executed a new settlement of one of the estates in favour of C., and thereby expressly revoked the former settlement: an action having been brought by the appellant, (the heir,) to set aside the latter deed on the head of death-bed, it was contended by the respondent C., that if the heir probated the revocation contained in the latter deed, she could not reprobate the other clause of that deed: but the doctrine of probate and reprobate was held inapplicable to the case: and Lord Eldon C. said, he thought this not a case where the doctrine would apply; the heir did not claim under the death-bed deed; he said, "Your deed does not give you a title, unless you can show me a deed executed in *liege poustie* existing at the death of the grantor; if there was no such deed, the deed executed on death-bed is gone."^h

**Doctrine
not applica-
ble to mat-
ters of evi-
dence.**

The doctrine has also been unsuccessfully attempted to be applied to matters of evidence, as, for instance, that a party cannot avail himself of an admission or a statement

^f See Bell's Comm. vol. i. pp. 147. 150. [5th ed.] P. C. 655.; Bell's Comm. vol. i. p.

^g See supra, pp. 209, 210. 226. et seq. 149., and n. 2. [5th ed.] And see

Cunningham v. Whiteford, Elch. Dec. voce "Death-bed," No. 19.

^h Crawford v. Coutts, 2 Bligh's

of fact contained in one part of a deed, and at the same time deny a fact or statement contained in another part of it.¹

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Again, attempts have been made to apply the doctrine to cases in which persons, who were bound to execute conveyances or infestments, had executed them with stipulations or reservations which they had no right to insert, and the parties holding right to the unfettered benefit of such conveyances and infestments were found entitled to that benefit, and at the same time refused to give effect to the stipulations and reservations: whence it appears, that the doctrine does not apply, if that identical thing, upon which an application of the doctrine is attempted to be founded, was compellable to be done.²

IV. As to the principle of compensation, resulting from an election to reprobate the instrument in reference to which the doctrine is applied.

Principle of
compensa-
tion.

Sufficient, it is conceived, has been said in a former chapter,³ respecting the general principle of compensation as established by the English Courts of Equity: the object therefore here is, shortly to inquire whether the same principle has been ingrafted by the Courts of Scotland upon their analogous doctrine of approbate and reprobate. The principle can, if at all, be brought into operation in those cases only where a party has elected to reprobate the instrument whereupon the doctrine arises; and this conduct, we have seen, was pursued by the appellants in the case of *Ker v. Wauchope*¹; they repudiated the deed of death-bed by reducing it as to the heritable property, and

¹ "Found that a party might lawfully approve and make use of one part of an instrument for proving his intent, and yet offer to improve another part of the same as false; 14 July, 1566., *Weir v. Laird of Lie, Lethington M.S.*; Mor. Dict. Dec. 605.

² No. 2. A third party was allowed to approbate one clause of a writ in his favour, and reprobate

the rest; 25. June 1691, *Lady Ballagan v. Lord Drumlanrig*.

See also *Anderson v. Bruce*, 21 Dec. 1681., *Stair*, ii. 280.; *Sir Patrick Home v. Earl of Home*, Mor. Dict. Dec. 612.

³ *Gray and Somervil v. Abercromby*, Mor. Dict. Dec. 609.; *Fea v. Traill*, ibid. 616.

¹ See supra, p. 276. et seq.

¹ See supra, p. 342.

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by so doing in effect made their election to take against it, and renounce all interest in the moveable effects over which the testator had an absolute control. Then the question arose, what disposition was to be made of the interest the appellants would have taken in those effects, if, instead of reprobating, they had elected to approve the deed. Supposing the principle of compensation was to be applied, then the respondents would be entitled to such interest, in order to compensate them for the loss they sustained in consequence of the appellants having elected to reprobate the deed. Upon this question the cause was remitted by the Court of Appeal for the decision of the Court of Session, viz., whether the respondents were or were not entitled to take their compensation until the death of the survivor of the appellants, which the Lord Chancellor thought to be very easy of solution. "There are," he observed, "certain persons who, according to "the expression and principles of our law, have a vested "remainder in the capital: they have also, by way of com- "pensation, a title to the life interest preceding that re- "mainder in the fund. If the appellants have no right, "and the respondents have all the right, in the subject "of litigation, why is it not to be applied immediately by "way of compensation, upon the ground that the con- "dition of the gift being rejected, the life estate did not "form part of the disposition?"

It seems clearly then to have been the opinion of the Lord Chancellor, that the principle of compensation may take effect as well in the Scotch law of probate and reprobate, as in the English doctrine of election, and is the necessary result of an election to reprobate the instrument upon which the question arises. And those cases that have been decided by the English Courts of Equity, wherein the principle of compensation has been enforced, may probably afford some rules of proceeding

* See 1 Bligh's P. C. 26, 27.; Bell's Comm. vol. i. pp. 150, 151., and Notes, [5th ed.]

in such cases as may hereafter arise in the Courts of Scotland, involving the same principle".

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A precise and original application however by the Court of Session, without the intervention or suggestion of the Court of Appeal, of the principle of compensation, where the terms proposed by the author of an election-case have not been acquiesced in, remains yet to be made.

It may be proper to add, that the learned author of the Commentaries on the Law of Scotland closes his observations on the general doctrine in the following words:— “ It will however require great consideration before this doctrine, in its full extent, be judicially admitted in Scotland. It will be found opposed by the necessity of holding the heir at law disinherited by mere implication, ^o which the law of Scotland does not recognize: and practical difficulties of no mean importance must be encountered in the making up of titles, and in giving effect to the implied will.” ^p

But advancing a step further, and assuming for a moment that the principle of compensation will be hereafter administered by the Court of Session whenever a case proper for its application shall arise, it may afford matter of nice conjecture what course the Court would pursue in the possible though somewhat improbable case of the free disposable property exceeding in point of value the property over which a power of disposition has been assumed, and the terms of election not being acquiesced in by the person to whom the same are proposed; whether the Court would give the whole of the free property to the person disappointed, and so constitute a case of absolute forfeiture as

*Principle
of forfei-
ture.*

* Upon inquiry whether any further discussion took place in the Court of Session upon the point remitted, the information supplied was, that nothing farther occurred in that Court; and that the parties acquiesced in what fell from the Lord Chancellor, as to the immediate application of the subject of litigation in favour of the respon-

dents, the funds having been divided in the course of six weeks after judgment given by the Court of Appeal.

* By the English doctrine, a clear intention is necessary to the putting an heir to election; see supra, p. 273.

^p See Bell's Comm. vol. i. p. 151. [5th ed.]

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between him and the party put to election, or would give the former so much only of the property as would be sufficient to compensate him for the loss he might have sustained; and if the latter course should be adopted, then whether the surplus value of the free property would be given to the party put to election, and declining to acquiesce in the terms thereof, and so as to subject him to a partial forfeiture only, or would be held to revert to the representatives of the person by whom the case of election was in the first instance promoted.

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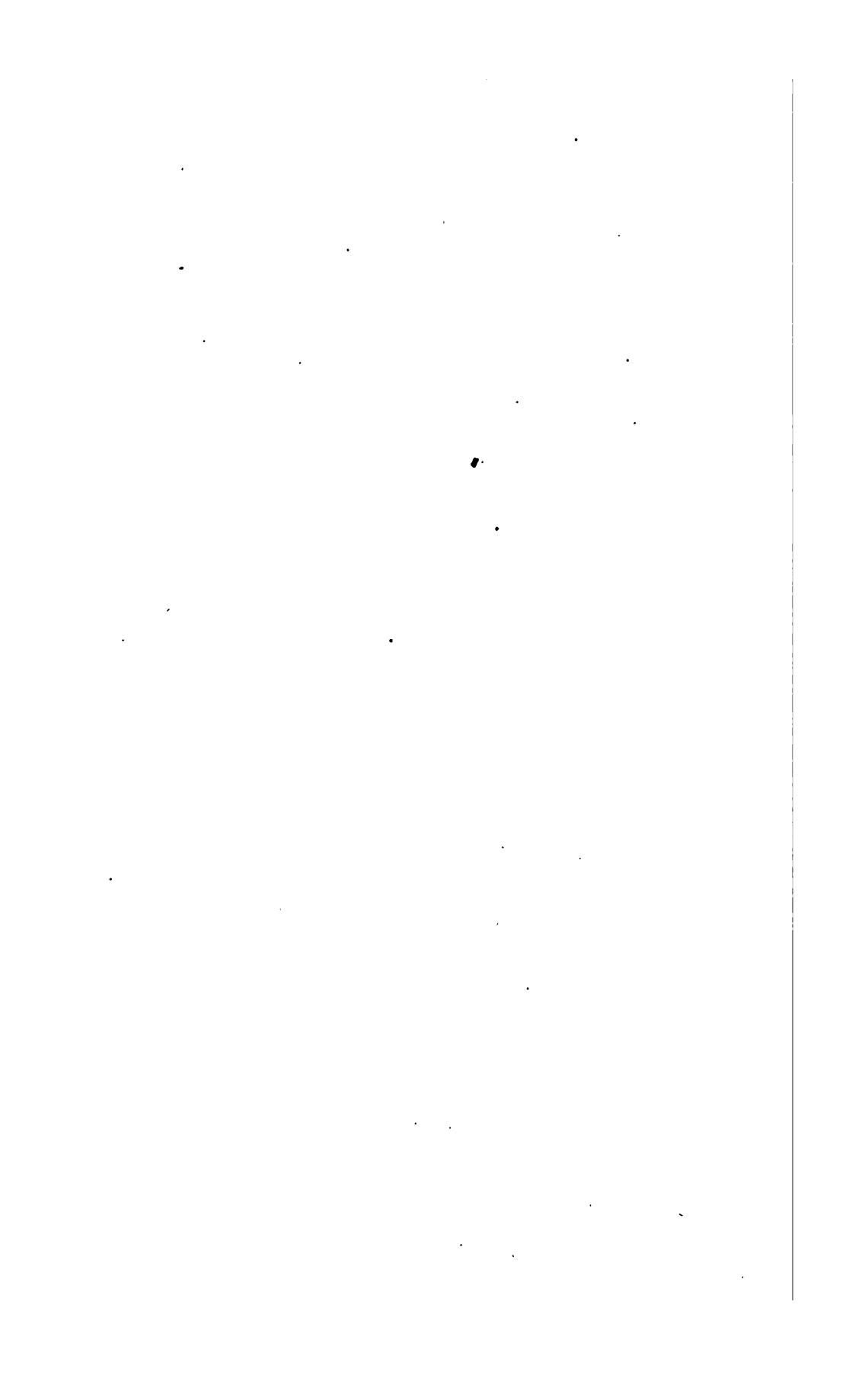
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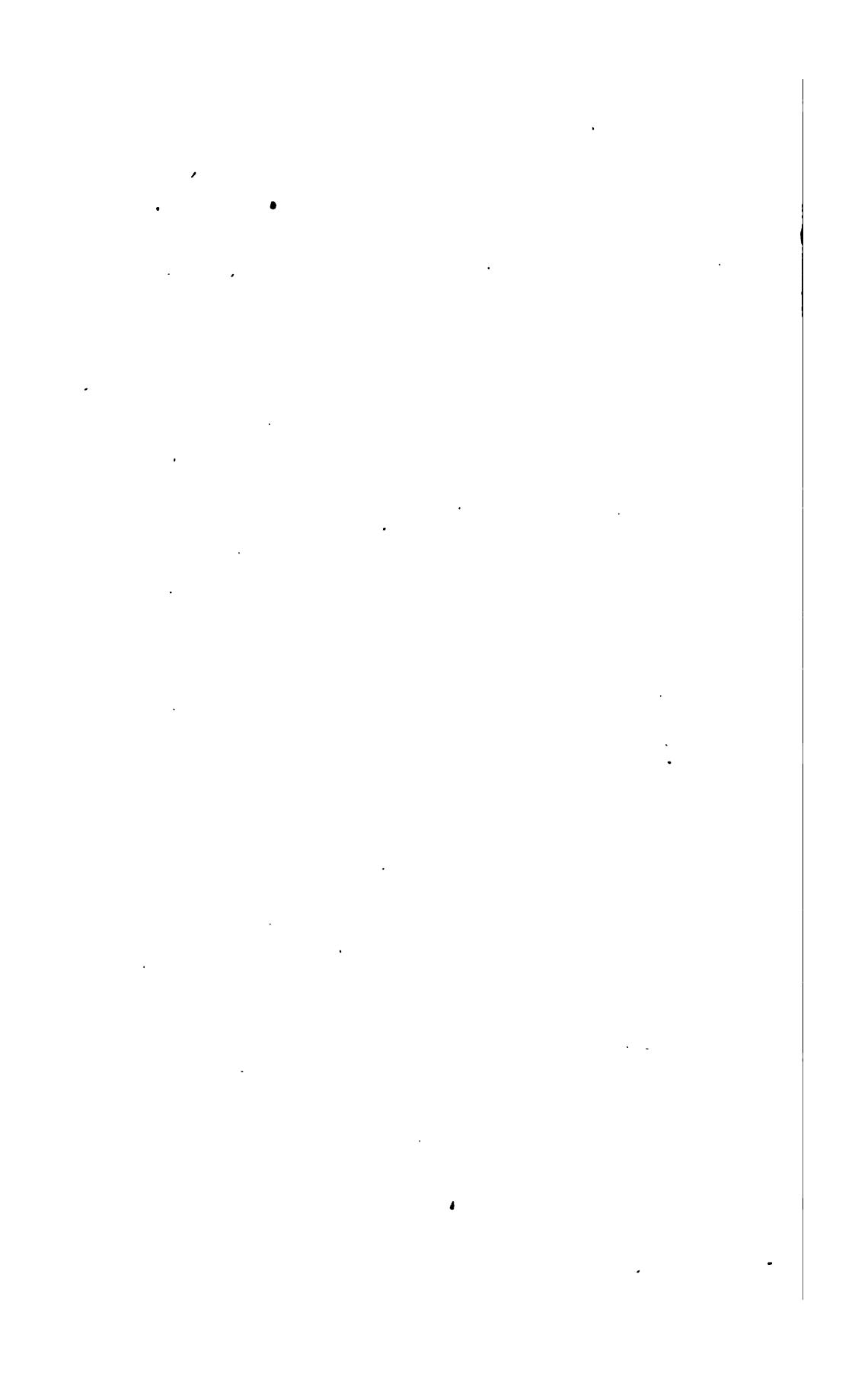
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